

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Marion D. Helmandollar,
Claimant Below, Petitioner

vs.) **No. 21-0597** (BOR Appeal No. 2056191)
(Claim No. 2019026743)

Blackhawk Mining, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Marion D. Helmandollar, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Blackhawk Mining, LLC, filed a timely response.¹ The issue on appeal is additional compensable conditions. The claims administrator denied the addition of disc prolapse with radiculopathy, acute low back pain, and spondylosis with radiculopathy in the lumbar region to the claim on July 3, 2019. On January 2, 2020, it denied a request for the addition of L4-5 retrolisthesis to the claim. The Workers' Compensation Office of Judges ("Office of Judges") reversed the decisions, in part, and added disc prolapse with radiculopathy and L4-5 retrolisthesis to the claim in its December 11, 2020, order. The order was reversed by the Board of Review on June 28, 2021, and the claims administrator's denials of the addition of disc prolapse with radiculopathy and L4-5 retrolisthesis to the claim were reinstated. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the Board of Review's decision is appropriate. *See* W. Va. R. App. P. 21.

Mr. Helmandollar, a coal miner fire boss, completed an Employees' and Physicians' Report of Injury on January 16, 2018, indicating he injured his mid and low back that day while pulling a roller out of some mud. Ashley Chapman, PA-C, opined that Mr. Helmandollar sustained an occupational low back injury that aggravated a prior back surgery. Lumbar x-rays were taken that day and showed a stable surgical fusion at L5-S1 since 2012 and mild retrolisthesis at L4-5 with advanced degenerative disc space narrowing, slightly progressed. The Employer's Report of Injury was completed on January 19, 2018, and indicates Mr. Helmandollar was attempting to remove a roller from mud when his feet became stuck, and he fell, straining his back. The claim was held compensable for low back sprain/strain on January 24, 2018.

¹Mr. Helmandollar is represented by Reginald D. Henry, and Blackhawk Mining, LLC, is represented by Sean Harter.

In a June 13, 2018, treatment note, Shahikant Bhavsar, M.D., stated that Mr. Helmandollar had chronic back pain since January and diagnosed disc prolapse with radiculopathy. A lumbar MRI was performed on July 3, 2018, and showed surgical changes at L5-S1 with no recurrent disc lesion. At L4-5 there was a desiccated disc signal change and disk space narrowing, as well as a mild disc protrusion. In a September 27, 2018, treatment note, John Schmidt, M.D., stated that Mr. Helmandollar was seen for mid and low back pain and had a history of prior lumbar surgery at L5-S1. It was noted that Mr. Helmandollar had healed well and saw good improvement of his symptoms after surgery. Dr. Schmidt stated that Mr. Helmandollar's current symptoms were consistent with lumbar radiculopathy. An MRI showed that the surgical hardware remained intact and surgical intervention was not recommended. Dr. Schmidt recommended physical therapy and evaluation and treatment from interventional pain management. The diagnosis was lumbar spondylosis with radiculopathy.

On November 8, 2018, Andrew Thymius, M.D., saw Mr. Helmandollar and recommended lumbar transforaminal epidural steroid injections, which were administered on November 29, 2018. In a February 5, 2019, treatment note, Melissa Lilly, PA-C, stated that Mr. Helmandollar saw 50% pain relief after his first lumbar injection. On February 25, 2019, Mr. Helmandollar received a second injection from Dr. Thymius for the diagnoses of lumbar radiculopathy, lumbar sprain, and other disc displacement.

In a February 27, 2019, treatment note, Dr. Bhavsar noted Mr. Helmandollar was seen for acute lumbosacral pain and that he was unable to work at that time. The diagnoses were lumbar spondylosis with radiculopathy, disc prolapse with radiculopathy, and acute low back pain. On April 8, 2019, Ms. Lilly noted that Mr. Helmandollar had received a second injection which provided 25% pain relief for about twenty days. She diagnosed lumbar spondylosis without myelopathy or radiculopathy and lumbar sprain and recommended lumbar facet joint nerve blocks.

In an April 9, 2019, independent medical evaluation, Joseph Grady, M.D., assessed lumbosacral sprain superimposed on previous lumbar spine surgery and pre-existing multilevel lumbar spondylosis. He noted that Mr. Helmandollar had diffuse degenerative changes of the lower back and stated that there were no acute findings on examination that day. Dr. Grady concluded that Mr. Helmandollar had reached maximum medical improvement and noted that Mr. Helmandollar had returned to work.

Dr. Bhavsar completed a diagnosis update on July 2, 2019, in which he requested the addition of disc prolapse with radiculopathy, acute low back pain, and lumbar spondylosis with radiculopathy to the claim. The claims administrator denied the addition of disc prolapse with radiculopathy, acute low back pain, and spondylosis with radiculopathy in the lumbar region to the claim on July 3, 2019.

Dr. Bhavsar testified in a September 11, 2019, deposition that he first saw Mr. Helmandollar on June 13, 2018. Prior to that, Mr. Helmandollar saw his physician's assistant, Ms. Chapman. He opined that Mr. Helmandollar aggravated or exacerbated his pre-existing lumbar condition on January 16, 2018. Dr. Bhavsar testified that Mr. Helmandollar had L4-5 retro displacement or retrolisthesis, which means one disc is slipping back onto the other. He opined

that it is not uncommon following surgery for patients to experience a new disc injury just above or below where the surgery was performed. Dr. Bhavsar opined that Mr. Helmandollar sustained a new injury in the form of L4 retrolisthesis and also sustained an aggravation of his prior L5-S1 issue. Dr. Bhavsar asserted that the symptoms were not the result of degenerative arthritis. He noted that retrolisthesis can cause nerve damage and opined that Mr. Helmandollar suffered a direct injury when he fell, as seen on the lumbar MRI. Dr. Bhavsar stated that Mr. Helmandollar developed retrolisthesis at L4 with sciatica, which represented a new injury. He also aggravated his prior L5-S1 injury. Dr. Bhavsar acknowledged that the April of 2000 MRI showed arthritis, degenerative disc disease at L4-5, grade one L5 spondylolisthesis, and bilateral L5-S1 spondylosis. A March 20, 2012, x-ray showed degenerative arthritis and degenerative disc disease. Mr. Helmandollar reported lower back pain from March of 2007 through January of 2018. Dr. Bhavsar stated that radiographs prior to January 2018 showed no L4 retrolisthesis. He testified that the acute low back pain is the result of L4-5 radiculopathy. Dr. Bhavsar opined that the diagnosis of other spondylosis with radiculopathy was a result of the new injury and could also be a combination of the new injury and the old injury. Further, Mr. Helmandollar did not have radiculopathy prior to the compensable injury. On March 25, 2018, Dr. Bhavsar found Mr. Helmandollar was able to return to work with no restrictions. He last saw Mr. Helmandollar for back pain on June 3, 2019.

In an October 29, 2019, diagnosis update, Dr. Bhavsar requested the addition of L4 retrolisthesis, acute back pain, disc prolapse with radiculopathy, and other lumbar spondylosis/radiculopathy to the claim. He noted that x-rays showed retrolisthesis after the injury. On December 17, 2019, Kenneth Fortgang, M.D., performed an Age of Injury Analysis of the July 3, 2018, lumbar MRI. He found no acute findings and opined that all of the findings were chronic. He also reviewed lumbar spine X-rays performed on January 16, 2018, and again found no acute findings. The claims administrator denied a request for the addition of L4-5 retrolisthesis as a compensable condition in the claim on January 2, 2020.

In its December 11, 2020, order, the Office of Judges modified the claims administrator's July 3, 2019, decision and added disc prolapse with radiculopathy to the claim. It also reversed the January 2, 2020, claims administrator decision and added L4 retrolisthesis to the claim. It found that Dr. Bhavsar, who completed the diagnosis updates requesting the addition of disc prolapse with radiculopathy, acute low back pain, spondylosis with radiculopathy in the lumbar region, and L4-5 retrolisthesis to the claim, gave persuasive testimony as to why L4-5 retrolisthesis should be added to the claim. He stated that the first x-ray taken after the injury showed L4-5 retrolisthesis. He asserted that though Mr. Helmandollar had preexisting degenerative conditions, the trauma of falling and jerking his back caused the discs to slip, resulting in a new injury. Dr. Bhavsar testified that radiographs taken prior to the compensable injury did not show L4-5 retrolisthesis. In his Age of Injury Analysis, Dr. Fortgang opined that there were no acute findings, but he failed to address Dr. Bhavsar's finding of a new injury. The Office of Judges found Dr. Bhavsar's findings to be the most persuasive of record. Based on a preponderance of the evidence, the Office of Judges concluded that L4-5 retrolisthesis and disc prolapse with radiculopathy should be added to the claim. It also concluded the acute low back pain should not be added to the claim because it is a symptom and not a diagnosis. Finally, the Office of Judges found that spondylosis with

radiculopathy should not be added to the claim because Dr. Bhavsar testified that spondylosis is the same thing as degenerative arthritis.

In its June 28, 2021, decision, the Board of Review reversed the Office of Judges' Order and reinstated the claims administrator's denial of the addition of disc prolapse with radiculopathy and L4 retrolisthesis to the claim. It found that Dr. Bhavsar, a family physician, requested the addition of the conditions to the claim. On September 27, 2018, Dr. Schmidt, a neurosurgeon, examined Mr. Helmandollar and stated that he previously underwent L5-S1 disc surgery in 2004. He noted that a July 3, 2018, lumbar MRI showed intact hardware at L5-S1, a disc bulge and facet hypertrophy at L4-5, and no significant central canal or foraminal stenosis. Surgery was not recommended. On April 9, 2019, Dr. Grady examined Mr. Helmandollar and found no current signs of radiculopathy. He diagnosed lumbar strain superimposed on prior lumbar surgery and pre-existing multilevel lumbar spondylosis. Dr. Fortgang performed an Age of Injury Analysis of the lumbar MRI and found no acute findings. The Board of Review concluded that the opinions of Drs. Grady and Schmidt, as well as the age of injury analysis, were more reliable than that of Dr. Bhavsar.

This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review, and when the Board's decision effectively represents a reversal of a prior order of either the Workers' Compensation Commission or the Office of Judges, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. *See* W. Va. Code § 23-5-15(c) & (e). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. of Ins. Comm'r*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

The standard for the addition of a new condition to a claim is the same as for compensability. For an injury to be compensable it must be a personal injury that was received in the course of employment, and it must have resulted from that employment. *Barnett v. State Workmen's Comp. Comm'r*, 153 W. Va. 796, 172 S.E.2d 698 (1970).

After review, we agree with the reasoning and conclusions of the Board of Review. A preponderance of the evidence indicates that Mr. Helmandollar did not develop disc prolapse with radiculopathy or L4 retrolisthesis as a result of the compensable injury. Dr. Fortgang performed an Age of Injury analysis and determined that all of the findings seen on the July 3, 2018, lumbar MRI and the January 16, 2018, x-rays were chronic. He found no evidence of an acute injury. Further, in his independent medical evaluation, Dr. Grady found no current signs of radiculopathy. The Board of Review did not err in reinstating the claims administrator's denials of the addition of disc prolapse with radiculopathy and L4 retrolisthesis to the claim.

Affirmed.

ISSUED: June 13, 2023

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice C. Haley Bunn

DISSENTING:

Justice William R. Wooton

Wooton, Justice, dissenting

On January 16, 2018, the claimant, Marion Helmandollar, sustained a work-related injury while “pulling a roller out of some mud” and falling backwards while at work. His claim was found compensable for low back strain/sprain. A February 27, 2019, treatment note written by the claimant’s treating physician, Dr. Shahikant Bhavsar, indicated that the claimant was seen for acute lumbar sacral pain and that he was unable to work at that time. The diagnoses were lumbar spondylosis with radiculopathy, disc prolapse with radiculopathy, and acute low back pain. However, by April of 2019, Dr. Joseph Grady, who had performed an independent medical examination, found that the claimant had reached maximum medical improvement and had returned to work. On July 2, 2019, Dr. Bhavsar requested the addition of disc prolapse with radiculopathy, acute low back pain, and lumbar spondylosis with radiculopathy to the claim. The claims administrator denied the addition of these conditions to the claim on July 3, 2019.

The Office of Judges found that Dr. Bhavsar, who requested the addition of disc prolapse with radiculopathy, acute low back pain, spondylosis with radiculopathy in the lumbar region, and L4-5 retrolisthesis to the claim, was the most persuasive evidence as to why L4-5 retrolisthesis should be added to the claim. He stated that the first x-ray taken after the injury showed L4-5 retrolisthesis. He asserted that although the claimant had preexisting degenerative conditions, the trauma of him falling and jerking his back caused the discs to slip, resulting in a new injury. Dr. Bhavsar testified in a deposition that radiographs taken prior to the compensable injury did not show L4-5 retrolisthesis. The Office of Judges found based on a preponderance of the evidence that disc prolapse with radiculopathy and L4-5 retrolisthesis should be added to the claim. It also concluded the acute low back pain should not be added to the claim because it was a symptom and not a diagnosis. It further found that spondylosis with radiculopathy should not be added to the claim because Dr. Bhavsar testified that spondylosis is the same thing as degenerative arthritis. Dr. Bhavsar found that the claimant sustained an aggravation or progression of his compensable injury since returning to work on March 12, 2019. He opined that the claimant was temporarily and totally disabled from February 25, 2019, through March 11, 2019. The Office of Judges concluded that the claimant was entitled to temporary total disability benefits for the period of time that he was unable to work.

The Board of Review reversed the decision of the Office of Judges based solely on its reweighing of the credibility of the employer’s doctors’ (Dr. John Schmidt, III, and Dr. Joseph

Grady, II) assessments of the claimant's conditions, which was that the claimant had not suffered a new injury. The Board of Review found the employer's doctors to be "reliable." Specifically, the Board of Review determined, with no discussion, that "Dr. Bhavsar's opinion is rebutted by the opinions of Dr. Grady and Dr. Schmidt" and that "disc prolapse with radiculopathy and L4 retrolisthesis are not casually connected to the compensable injury."

I believe the Board of Review committed reversible error in its decision to reverse the Office of Judges. The decision was not based on the evidence but on a reweighing of the credibility of the evidence. The Office of Judges did not err in its determination that a preponderance of the evidence supported finding that the claimant suffered disc prolapse with radiculopathy and L4 retrolisthesis – a new injury – which should have been held compensable and that the claimant was entitled to temporary total disability benefits for the period of time that he was unable to work.

For the foregoing reasons, I respectfully dissent.