

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
January 14, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MICHAEL A. SMITH,
Claimant Below, Petitioner

vs.) No. 12-0788 (BOR Appeal No. 2046704)
(Claim No. 2005017224)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
Commissioner Below, Respondent

and

HUBCO, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Michael A. Smith, by William C. Gallagher, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of the Insurance Commissioner, by Jay Craig, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 31, 2012, in which the Board affirmed a November 28, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's November 17, 2010, decision denying a request to add lumbosacral pain with radiculopathy and cervical pain with radiculopathy to the 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.

Mr. Smith was injured in the course of his employment on October 20, 2004. He was struck by a mold that exploded, flipped him onto his back, and splattered him with liquid metal. His claim was held compensable for cervicgia; lumbago; pain in the limb; contusion of the face; contusions of the foot and ankle; and seven separate burn injuries to the head, forearm, hand, and leg. Mr. Smith has a history of back pain. In 1993, he fell approximately twenty feet off of a ladder and injured his lower back. In 1997, he was seen in the emergency room for pain in his back and legs. In 1998, he was seen in the emergency room for lumbar muscle spasms.

Following his compensable injury in October of 2004, Mr. Smith experienced pain in his neck, back, and legs. A lumbar MRI taken one month after the injury showed that he suffered from bilateral L4 spondylosis. In a medical report from Ohio Valley Pain Management Center on February 7, 2005, it was determined that Mr. Smith's chronic lower back pain and radiculopathy were secondary to degenerative changes of the spine. It was also noted in that report that an x-ray revealed degenerative changes and spurring in the cervical spine.

In an independent medical evaluation conducted by Dr. Waleed Mansour on June 15, 2005, Mr. Smith was found to be at maximum medical improvement for his compensable conditions. Approximately two months later, he was involved in a motor vehicle accident which resulted in injuries to his neck, back, right shoulder, and right hip. In 2010, Mr. Smith requested that lumbosacral pain with radiculopathy and cervical pain with radiculopathy be added to his claim. The claims administrator denied the request on November 17, 2010. Dr. George Naum, Mr. Smith's treating physician, wrote a letter on August 1, 2010, that expressed his opinion that Mr. Smith's current problems were the result of his work-related injury. Dr. Naum noted that Mr. Smith's symptoms had been continuous since the injury.

The Office of Judges found in its November 28, 2011, Order, that the claims administrator properly denied the request to add lumbosacral pain with radiculopathy and cervical pain with radiculopathy to the claim. The Office of Judges determined that a preponderance of the evidence indicated that Mr. Smith's current lumbosacral and cervical pain and radiculopathy were not related to the compensable injury of October 20, 2004. The Office of Judges found that Mr. Smith had a history of lower back pain. It noted that Dr. Naum found that his symptoms were the result of his work-related injury. The Office of Judges found his opinion to be unpersuasive, because the lumbar symptoms pre-existed the compensable injury, and both the cervical and lumbar spine show degenerative disc disease as evidenced by x-rays taken a year after the injury. Additionally, the Office of Judges found that Mr. Smith experienced two motor vehicle accidents after the compensable work injury. One of those accidents resulted in pain in his neck, back, and right shoulder.

The Office of Judges found no persuasive evidence in the record linking Mr. Smith's compensable injury to his current symptoms. Mr. Smith's treatment records attribute his current symptoms to degenerative changes of the spine and two motor vehicle accidents. In February of 2005, a treatment report from Ohio Valley Pain Management Clinic attributed Mr. Smith's pain to degenerative changes and stenosis. A report from Wheeling Hospital in October of 2006 noted that his leg pain was exacerbated by a motor vehicle accident in 2005. Additionally, the Office of

Judges noted that cervical pain with radiculopathy and lumbar pain with radiculopathy are symptoms, but do not constitute acute occupational injuries.

The Board of Review adopted the findings of fact and conclusions of law and affirmed the Order of the Office of Judges in its May 31, 2012, decision. This Court agrees with the reasoning and conclusions of the Board of Review. Mr. Smith was found to be at maximum medical improvement for his compensable injury in 2005. His medical reports indicate that his lumbar symptoms pre-existed his compensable injury, and both his lumbar and cervical spine show that he suffers from degenerative changes. The only evidence on the record that links Mr. Smith's current symptoms to his compensable work injury is the opinion of his treating physician, Dr. Naum. A preponderance of the evidence indicates that the Board of Review was correct in its conclusion that Mr. Smith's current symptoms are not the result of his work-related injury and are therefore not compensable.

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 Menis E. Ketchum

Justice Allen H. Loughry II

DISSENTING:

Justice Margaret L. Workman

Justice Brent D. Benjamin, Not Participating