

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

DANIEL T. SAVINO,
Claimant Below, Petitioner

vs.) No. 17-0234 (BOR Appeal No. 2051241)
(Claim No. 2014012812)

MYLAN PHARMACEUTICALS, INC.,
Employer Below, Respondent

FILED

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

MEMORANDUM DECISION

Petitioner Daniel T. Savino, by J. Robert Weaver, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Mylan Pharmaceuticals, Inc., by H. Dill Battle III, its attorney, filed a timely response.

The issue on appeal is whether the claim should be reopened for consideration of additional temporary total disability benefits. This appeal originated from the August 26, 2015, claims administrator's decision denying a petition to reopen the claim for temporary total disability benefits for the period of October 2, 2014, through November 9, 2014. In its March 22, 2016, Order, the Workers' Compensation Office of Judges affirmed the decision. The Board of Review's Final Order dated February 9, 2017, affirmed the Order of the Office of Judges. 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.

Daniel T. Savino, an employee for Mylan Pharmaceuticals, Inc., was injured in the course of his employment on October 22, 2013. As a utility aid, Mr. Savino's job consisted of monitoring a hopper with tablets and bottles. Mr. Savino sat on a stool on a platform two feet above the ground. On the night of the injury, there were some problems occurring with the bottles and Mr. Savino had to jump off of the platform several times over the course of the

evening. At one point, Mr. Savino felt a pop and a sharp pain in his right knee. Mr. Savino went to the on-site nurse and was sent on to outside care. On October 24, 2013, Mr. Savino presented to Nicholas Zervos, M.D., with a chief complaint of right knee pain, although he was also experiencing pain to a lesser degree in his left knee. An application for benefits was completed and Dr. Zervos listed the diagnosis as bilateral knee problems. On November 22, 2013, the claims administrator denied the claim stating that neither Mr. Savino nor Dr. Zervos had described an occupational injury. The symptoms were attributed to an exacerbation of pre-existing conditions.

Mr. Savino continued to suffer knee pain and eventually underwent an MRI of the right knee on January 10, 2014. The MRI revealed a complex tear of the posterior horn of the medial meniscus. On January 22, 2014, Mr. Savino sought treatment from Christopher Vasilakis, M.D., a colleague of Dr. Zervos. Upon examination, Dr. Vasilakis noted no right knee effusion but stated there was mild crepitus. Dr. Vasilakis's impression was that the right knee injury was work-related and occurred when Mr. Savino was jumping off of the stool multiple times to fix problems with the assembly line. Dr. Vasilakis requested authorization for a right knee arthroscopy for a partial meniscectomy and chondroplasty, if needed. The procedure was subsequently performed under Mr. Savino's private insurance on October 2, 2014. The pre-operative and post-operative diagnosis was right knee chondromalacia of the medial meniscal tear.

On November 12, 2014, Mr. Savino testified in a deposition about his employment and injury. Prior to his employment with Mylan Pharmaceuticals, Inc., Mr. Savino sustained an injury to the back of his knee when he was bitten by a dog. Mr. Savino had also injured his lower back while in the Marine Corps. However, Mr. Savino testified that prior to the instant claim, he never had knee problems. Mr. Savino described the injury, stating that it occurred during a shift at work where he was jumping up and down from a platform that was two feet off the ground. On one jump, he heard his right knee pop. Both knees were hurting during the shift but only the right knee popped. When he initially went to the doctor after the injury, Mr. Savino was told that he had overstressed his knees. However, an MRI showed torn cartilage. Mr. Savino subsequently had surgery on October 2, 2014, and was off work until November 9, 2014.

In the course of the claim, Mr. Savino underwent an independent medical evaluation on January 22, 2015, performed by ChuanFang Jin, M.D. Dr. Jin's impression was bilateral knee pain; right knee medial meniscal tear, status post partial meniscectomy; and chondromalacia, status post chondroplasty in the right knee. Dr. Jin attributed the entirety of Mr. Savino's problems to chondromalacia, a softening of the cartilage of a joint. Dr. Jin explained that the etiology for this condition could include trauma but also non-traumatic causes such as degeneration in the knee, commonly seen in middle age and elderly people. Dr. Jin stated that stepping stools or steps are not a risk factor for chondromalacia. Regarding the medial meniscal tear, Dr. Jin stated that it was difficult to determine when it occurred but noted that there was insufficient medical evidence to relate the tear to the alleged injury as there is no documented clinical finding suggestive of a meniscal tear. She stated that a meniscal tear can be degenerative and it is common in degenerative knees with or without trauma. Dr. Jin opined that in Mr. Savino's case, the mechanism of stepping on and off a stool did not appear to describe any injury

as it was not a traumatic incident. Dr. Jin noted that Mr. Savino had been diagnosed with degenerative arthrosis, a chronic and progressive disease, which is often asymptomatic in its early stages. It was her opinion that this disease progressed to the point that Mr. Savino became symptomatic and required more frequent treatment, which Dr. Jin did not attribute to his occupation.

On March 31, 2015, the Office of Judges reversed the claims administrator's decision denying the claim and found that a preponderance of the evidence supported holding the claim compensable. The Office of Judges noted that there was no evidence showing that Mr. Savino suffered a prior injury to his right knee. Further, Mr. Savino's description of the injury was consistent with the symptoms reported. The Office of Judges concluded that Mr. Savino gave a credible version of how the injury occurred and the medical records are not inconsistent with such a conclusion. Therefore, the Office of Judges held the claim compensable for right knee injury. The Board of Review affirmed the Order of the Office of Judges.

On August 4, 2015, Mr. Savino requested that the claim be reopened for temporary total disability benefits for the period of October 2, 2014, through November 9, 2014, the period following his knee surgery. Mr. Savino underwent an independent medical evaluation performed by Victoria Langa, M.D., on August 10, 2015. Dr. Langa stated that she was not informed of any compensable conditions in the claim. Dr. Langa diagnosed status post right knee arthroscopy with presumed partial medial meniscectomy and patellofemoral chondroplasty. Dr. Langa opined that Mr. Savino had persistent symptomatic chondromalacia of the patella of the right and left knee, which existed prior to the compensable injury and was not work-related. The chondromalacia might have occasionally been exacerbated by physical activities, which is what Dr. Langa believed occurred on the date of the compensable injury. Dr. Langa stated that this had long since resolved and found Mr. Savino to be at maximum medical improvement for chondromalacia of the patella. Dr. Langa opined that the etiology of the medial meniscal tear was unknown.

Mr. Savino testified in a second deposition on October 28, 2015, that on the date of injury he hurt his right knee from jumping off of a stool and down onto a platform. Subsequent to the injury, he was under medical care for a torn right meniscus. An MRI revealed the tear in the right knee for which Mr. Savino underwent surgery using his private health insurance. Following repair of the tear, Mr. Savino was off work for approximately five weeks from October 2, 2014, through November 9, 2014. Mr. Savino testified that he continues to have problems with his right knee. It sometimes catches and he experiences pain with substantial use.

On March 22, 2016, the Office of Judges affirmed the claims administrator's decision denying the request to reopen the claim for temporary total disability benefits. The Office of Judges stated that the medical evidence does not support reopening the claim. Neither Mr. Savino nor his treating physicians have attempted to add a specific diagnosis to the claim, leaving the sole compensable condition as a right knee injury. The reopening application was based upon Dr. Vasilakis's examination which was performed over nine months after the compensable injury. Ultimately, the Office of Judges concluded that this was an insufficient basis upon which to base reopening the claim and for that reason it denied the request. The Board

of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on February 9, 2017.

After review, we agree with the conclusion reached by the Office of Judges and affirmed by the Board of Review. Neither Mr. Savino nor his treating physicians have attempted to have an exact diagnosis added to the claim. Both Dr. Jin and Dr. Langa have attributed Mr. Savino's symptoms to chondromalacia and have opined that the condition is degenerative in nature and not related to the compensable injury. Mr. Savino has failed to present sufficient evidence suggesting that his surgery was performed to correct an occupational injury and thus the request to reopen the claim for temporary total disability benefits following the surgery is 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 Elizabeth D. Walker

DISSENTING:

Justice Menis E. Ketchum