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C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Devorea Scarbro,
Claimant Below, Petitioner

vs.) **No. 22-0259** **(**BOR Appeal No. 2057410)
(JCN: 2020011707)

VP Management, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Devorea Scarbro appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent VP Management, LLC, filed a timely response.[1] The issues on appeal are compensability of additional diagnoses, entitlement to temporary total disability benefits, and medical treatment. The claims administrator denied a request to add radiculopathy of the lumber region, L4-L5 radiculitis, and radiculopathy of the lumbosacral region as compensable conditions on April 29, 2020; closed the instant claim for temporary total disability benefits on October 22, 2020; denied authorization for two additional lumbar epidural injections on November 4, 2020; and denied authorization for an EMG/NCS study of the claimant's lower extremities on December 16, 2020. The Workers' Compensation Office of Judges ("Office of Judges") affirmed each of the claims administrator's four decisions in its September 30, 2021, order. The order was affirmed by the Board of Review on March 21, 2022. Upon our review, we determine that oral argument is unnecessary and that this case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for reversal in a memorandum decision rather than an opinion. *See* W. Va. R. App. P. 21.

On October 28, 2019, petitioner, an assistant general manager at a travel lodge, presented at the Plateau Medical Center emergency department with complaints of pain in her right wrist, right shoulder, and lower back. The pain began four days earlier when petitioner was bending over and pulling laundry out of a washing machine at work. At the emergency department, Todd A. Lares, M.D., assessed petitioner with a sprain of the carpal joint of the right wrist, a sprain of the right shoulder, a sprain of the ligaments of the lumbar spine, and intervertebral disc disorders with radiculopathy in the lumbar region. Dr. Lares also recorded degenerative disc disease in the treatment notes. According to petitioner's medical records, she was diagnosed with sciatica, which

[1]Petitioner is represented by Reginald D. Henry, and respondent is represented by Jillian L. Moore and Steven K. Wellman.

is back pain radiating down one or both legs, in 2013. Also, for a lower back injury in 2014, petitioner received an 8% permanent partial disability award in claim no. 2015014704.

On October 31, 2019, petitioner completed an Employees' and Physicians' Report of Injury stating that on October 24, 2019, she injured her right wrist, right shoulder, and lower back when pulling a tangled load of laundry out of a washing machine. Petitioner stated that she put her foot on the washing machine and pulled "really hard." The load became unstuck and caused petitioner to hit her right wrist and shoulder on the washing machine and to twist her back. Petitioner stated that she heard a pop. Richard Spencer, M.D., completed the physician's section of the form. Dr. Spencer found that petitioner struck her right wrist and wrenched her right shoulder and lower back in an occupational injury. Dr. Spencer took petitioner off work and indicated that the date on which she may return to work was to be determined. Dr. Spencer also referred petitioner to Orthopedic & Spine Surgery Associates. Finally, Dr. Spencer stated that he was unsure if the incident aggravated petitioner's previous lower back injury.

On November 15, 2019, the claims administrator held the instant claim compensable for a right wrist sprain, a right shoulder sprain, and a lumber (lower back) sprain. The claims administrator stated that payment of temporary total disability benefits depended on the receipt of medical evidence showing petitioner's inability to work.

Petitioner saw Rajesh V. Patel, M.D., of Orthopedic & Spine Surgery Associates on December 11, 2019. Petitioner had limited range of motion in the lumbosacral spine. However, while x-rays showed degenerative changes in the lumbar spine, the x-rays did not reveal any fractures, dislocations, or instabilities. A CT scan of the lumbar spine disclosed stenosis at L3-L4 and L4-L5 and facet arthropathy and lateral recess narrowing at L5-S1. There was air in the sacroiliac joints. Dr. Patel assessed petitioner with a lumbar sprain, lumbar stenosis, bilateral sacroiliac pain, and bilateral radiculitis at L5. Dr. Patel wanted to rule out a lumbar disc herniation and to start petitioner on physical therapy.

Petitioner underwent an MRI of the lumbar spine on December 13, 2019. Robert B. Davis, M.D., found that there were degenerative disc bulges at multiple levels, with mild central canal and foraminal stenosis. There were no definite herniations.

Dr. Patel submitted a diagnosis update on February 17, 2020, that sought to add additional components to the claim. Per the form's instructions, Dr. Patel listed the diagnosis code for a sprain of the ligaments of the lumbar spine as the primary diagnosis. Dr. Patel then added the diagnosis codes for radiculopathy in the lumbar region and radiculopathy in the lumbosacral region. Under "Description," Dr. Patel wrote "bilateral sacroiliac sprain" and "L4-5, radiculitis R>L." For the basis of the new diagnoses, Dr. Patel referred to his treatment notes. In the treatment notes for January 22, 2020, Dr. Patel stated that an MRI revealed no significant disc herniation. There were disc protrusions at L2-L3 and L4-L5 with some lateral recess narrowing associated with the L4-L5 protrusion. Dr. Patel recorded limited range of motion in the lumbosacral spine. Dr. Patel assessed petitioner with (1) lumbar sprain; (2) L5-S1 lumbar radiculitis greater on the right than the left side; (3) bilateral sacroiliac pain; (4) lumbar sprain (again); (5) lumbar facet sprain; and (6) L4-L5 disc protrusion. Dr. Patel opined that surgical intervention is not indicated as the focus

was on conservative treatments. Petitioner was to continue physical therapy, and facet and epidural injections would provide relief for petitioner's radicular symptoms and facet-related pain.

On March 4, 2020, the claims administrator authorized bilateral facet joint injections and transforaminal epidural steroid injections.[2] In authorizing the injections, the claims administrator reversed an earlier denial of authorization based upon an internal grievance board decision, which recommended that "the requested treatment [be] approved since [petitioner] appears to have an aggravation of her pre-existing lumbar condition with symptoms of radiculitis and she has not been placed at maximum medical improvement yet for this claim."

Rebecca Thaxton, M.D., conducted a physician review of the request to add conditions as compensable components of the instant claim on March 23, 2020. Dr. Thaxton listed bilateral sacroiliitis and lumbar radiculitis, which Dr. Patel wrote under "Description" of the February 17, 2020, diagnosis update, as the diagnoses under consideration. Dr. Thaxton acknowledged that the facet injections recommended by Dr. Patel were authorized and stated that "[i]f the work injury flared the symptoms of the underlying degenerative condition, then treatments for the symptoms could be authorized in the claim until [petitioner] reaches maximum medical improvement . . . or [a] pre-claim baseline[.]" However, Dr. Thaxton determined that the MRI findings did not support "a new lumbar radiculopathy." Dr. Thaxton stated that Dr. Patel failed to explain the presence of radiculopathy or relate it to the instant compensable injury, "especially in light of [petitioner]'s preexisting issues and the lack of acute disc herniation." Therefore, Dr. Thaxton concluded that the additional diagnoses requested by Dr. Patel should not be included as compensable components of the instant claim. On April 29, 2020, the claims administrator denied the request to add compensable conditions to the instant claim, listing radiculopathy in the lumbar region and radiculopathy in the lumbosacral region, for which Dr. Patel provided diagnosis codes in the February 17, 2020, diagnosis update, and indicating that it considered L4-L5 radiculitis from the "description" section of the diagnosis update, to be included as a part of radiculopathy in the lumbar region.

Petitioner was seen by Prasadarao B. Mukkamala, M.D., on August 19, 2020, for an independent medical evaluation. Dr. Mukkamala determined that preexisting conditions may be causing petitioner's complaints. Dr. Mukkamala found that, in addition to petitioner's previous back injury, she had osteoarthritis in the right wrist and spondyloarthropathy in the lower back. Dr. Mukkamala was equivocal about the extent to which the instant compensable injury impacted the preexisting conditions. Dr. Mukkamala stated: "There was no evidence that the injury of 10/24/2019 aggravated the preexisting conditions, but most certainly, it exacerbated the preexisting conditions." However, Dr. Mukkamala opined that the injections petitioner had been receiving as a part of pain management were neither related to nor required by the instant compensable injury. Dr. Mukkamala found the injections were treating solely petitioner's preexisting, non-compensable conditions. Dr. Mukkamala rated petitioner as having reached maximum medical improvement with regard to the instant compensable injury. Dr. Mukkamala

[2]West Virginia Code § 23-4-3 and West Virginia Code of State Rules § 85-20-9.1 (2006) provide that a claimant must be provided reasonably necessary and medically related treatment for a compensable injury.

found that petitioner could return to work at a light physical demand level with a limit of lifting no more than ten pounds on a frequent basis and no more than twenty-five pounds on an occasional basis.

Due to his finding that petitioner was at maximum medical improvement, Dr. Mukkamala provided an impairment rating of 8% for the lower back. Dr. Mukkamala attributed one-half of the impairment to the preexisting spondyloarthropathy and one-half of the impairment to the instant compensable injury. While Dr. Mukkamala gave petitioner 4% impairment for the instant compensable injury, he concluded that she had previously been fully awarded by her receipt of 8% permanent partial disability in claim no. 2015014704.

Petitioner saw Francis M. Saldanha, M.D., for pain management on September 16, 2020. Dr. Saldanha noted Dr. Mukkamala's findings that petitioner was at maximum medical improvement and that she could not resume heavy-duty work. When Dr. Saldanha examined petitioner, she had diminished range of motion in the lumbar spine. There was moderate tenderness in the back. Dr. Saldanha diagnosed petitioner with a lumbar sprain, lumbar radiculitis, and lumber facet syndrome. Dr. Saldanha requested authorization for two additional lumbar epidural injections.

On September 18, 2020, the claims administrator suspended the payment of temporary total disability benefits and advised petitioner that she had thirty days to submit evidence justifying the continuation of temporary total disability benefits.[3] On September 24, 2020, Dr. Spencer, who was petitioner's treating physician, reported that petitioner was still unable to return to work.

Randall L. Short, D.O., conducted a physician review of Dr. Saldanha's request for two additional lumbar epidural injections on October 5, 2020. Based on the available medical records, Dr. Short found that while petitioner's preexisting degenerative lumbar disease was significant, it had been "exacerbated by" the instant compensable injury. However, Dr. Short relied on Dr. Mukkamala's report and finding of maximum medical improvement to conclude that petitioner "would not require further follow up . . . office visits, medications, or pain management." Therefore, Dr. Short recommended that authorization for two additional lumbar epidural injections be denied. The claims administrator denied authorization for these injections on November 4, 2020.

On October 22, 2020, Dr. Spencer requested authorization for an EMG/NCS study of the lower extremities for purposes of comparison with an EMG/NCS study from 2014. In addition, by

[3]West Virginia Code § 23-4-7a(e) provides, in pertinent part, that a finding "the claimant has reached his or her maximum degree of [medical] improvement terminates the claimant's entitlement to temporary total disability benefits regardless of whether the claimant has been released to return to work" and that the claims administrator "shall enter a notice suspending the payment of temporary total disability benefits but providing a reasonable period of time during which the claimant may submit evidence justifying the continued payment of temporary total disability benefits . . . ."

correspondence dated October 25, 2020, Dr. Spencer disputed Dr. Mukkamala's finding of maximum medical improvement. Dr. Spencer stated that the instant compensable injury aggravated the chronic condition in petitioner's right wrist and that an MRI of the right shoulder revealed a partial tear of the supraspinatus muscle. In addition, petitioner had treatment options available for her lower back with Dr. Patel's final recommendation still forthcoming. Thus, Dr. Spencer concluded that petitioner remained temporarily and totally disabled due to the instant compensable injury.

James M. Dauphin, M.D., conducted a physician review of Dr. Spencer's request for a new EMG/NCS study on November 5, 2020. Dr. Dauphin stated that he agreed with the rationale Dr. Short adopted in recommending the denial of authorization for additional lumbar epidural injections. Dr. Dauphin found that petitioner's degenerative disc disease was causing her symptoms. Therefore, Dr. Dauphin recommended that authorization for a new EMG/NCS study of petitioner's lower extremities be denied. The claims administrator denied authorization on December 16, 2020.

In its September 30, 2021, order, the Office of Judges affirmed the claims administrator's (1) April 29, 2020, order denying the request to add radiculopathy of the lumber region, L4-L5 radiculitis, and radiculopathy of the lumbosacral region as compensable conditions in the instant claim; (2) October 22, 2020, order closing the instant claim for temporarily total disability benefits; (3) November 4, 2020, order denying authorization for two additional lumbar epidural injections; and (4) December 16, 2020, order denying authorization for a new EMG/NCS study of petitioner's lower extremities. The Office of Judges determined that while Dr. Spencer may be correct that there are still treatments that could help petitioner, none of those treatments were reasonably necessary to treat the instant compensable injury. The Office of Judges found that petitioner never sought an additional compensable diagnosis for her right shoulder injury and that her medical history revealed several preexisting lower back problems. Accordingly, the Office of Judges concluded that Dr. Mukkamala properly assessed petitioner as being at maximum medical improvement with regard to the instant compensable injury, which involved only sprains of the right wrist and shoulder and the lower back. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed the order on March 21, 2022.[4]

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 affirms prior rulings by both the Workers' Compensation Commission and 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 based upon a material misstatement or mischaracterization of the evidentiary record. *See* W. Va. Code §§ 23-5-15(c) & (d). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. Ins. Comm'n*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

[4]The Board of Review made minor corrections to the Office of Judges' September 30, 2021, order that are not relevant to this appeal.

After review, we find that there was a material misstatement of the evidentiary record regarding the impact the instant compensable injury had on petitioner's preexisting conditions. When affirming the claims administrator's four orders, the Office of Judges did not find that petitioner was generally at maximum medical improvement as it credited Dr. Spencer's finding that there still could be treatments that could help petitioner. Rather, the Office of Judges affirmed the claims administrator's orders because it found that Dr. Mukkamala properly determined that petitioner was at maximum medical improvement with regard to the instant compensable injury and was receiving treatment only for preexisting, non-compensable conditions. However, Dr. Mukkamala also confusingly stated that "[t]here was no evidence that the injury of 10/24/2019 aggravated the preexisting conditions, but most certainly, it *exacerbated* the preexisting conditions." (Emphasis added.)

In *Moore v. ICG Tygart Valley, LLC*, 247 W. Va. 292, 879 S.E.2d 779 (2022), we stated that "a claimant has the burden of proving that the compensable injury *exacerbated*, accelerated, or worsened the preexisting condition or disease causing a new distinct injury." *Id.* at 301, 879 S.E.2d at 788 (citing Syl. Pt. 3, *Gill v. City of Charleston*, 236 W. Va. 737, 783 S.E.2d 857 (2016)) (emphasis added). In Syllabus Point 3 of *Gill*, this Court set forth the general rule that:

> A noncompensable preexisting injury may not be added as a compensable component of a claim for workers' compensation medical benefits merely because it may have been aggravated by a compensable injury. To the extent that the aggravation of a noncompensable preexisting injury results in a [discrete] new injury, that new injury may be found compensable.

236 W. Va. at 738, 783 S.E.2d at 858. In Syllabus Point 5 of *Moore*, we held that:

> A claimant's disability will be presumed to have resulted from the compensable injury if: (1) before the injury, the claimant's preexisting disease or condition was asymptomatic, and (2) following the injury, the symptoms of the disabling disease or condition appeared and continuously manifested themselves afterwards. There still must be sufficient medical evidence to show a causal relationship between the compensable injury and the disability, or the nature of the accident, combined with the other facts of the case, raises a natural inference of causation. This presumption is not conclusive; it may be rebutted by the employer.

247 W. Va. at 294, 879 S.E.2d at 781.

In the instant case, petitioner argues that despite Dr. Mukkamala's finding that she was at maximum medical improvement, he did not find that petitioner could resume her job without limitation. Instead, Dr. Mukkamala advised that petitioner could return to work with a limit of lifting no more than ten pounds on a frequent basis and no more than twenty-five pounds on an occasional basis. Prior to the instant compensable injury, petitioner did not have symptoms which prevented her from performing all of her job duties. Accordingly, because the medical evidence of record raises a possible natural inference of causation as to petitioner's medical issues, we reverse

the Board of Review's March 21, 2022, order and remand this case to the Board for a further review of the claims administrator's four orders pursuant to *Moore*.

Reversed and Remanded with Directions.

ISSUED: January 25, 2024

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton

DISSENTING:

Justice C. Haley Bunn

Bunn, Justice, dissenting:

I dissent to the majority's resolution of this case. I would have set this case for oral argument to thoroughly address the error alleged in this appeal. Having reviewed the parties' briefs and the issues raised therein, I believe a formal opinion of this Court was warranted, not a memorandum decision. Accordingly, I respectfully dissent.