

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Herold Harbert,
Claimant Below, Petitioner

vs.) **No. 22-0264** (BOR Appeal No. 2057426)
(JCN: 2020017901)

Astorg Auto of Charleston, Inc.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Herold Harbert appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent Astorg Auto of Charleston, Inc., filed a timely response.¹ The issue on appeal is entitlement to medical treatment. The claims administrator denied authorization for a consultation with a foot and ankle specialist and possible reconstructive surgery on September 28, 2020. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the claims administrator's decision in its September 30, 2021, order. The order was affirmed by the Board of Review on March 10, 2022. 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.

On January 20, 2020, petitioner, a parts clerk employed by respondent, was pulling down a large SUV tire when it bounced on the floor and bounced back on his right foot causing a fracture. Petitioner initially sought treatment from his family physician.

When the swelling worsened, petitioner presented at the emergency room on January 28, 2020. Petitioner underwent a CT scan of his right foot, and Shawn DeWayne Reesman, M.D., found that there was a fracture dislocation of the navicular bone. On January 29, 2020, Aaron Leigh Sop, D.O., performed an open reduction internal fixation right navicular fracture; an open reduction internal fixation right navicular dislocation; an open reduction internal fixation navicular dislocation; and an open reduction internal fixation right medial, middle, and lateral cuneiform fractures. The procedure required the installation of plates and screws in petitioner's right foot.

Petitioner was discharged from the hospital on January 30, 2020, and the final report listed type 2 diabetes as one of petitioner's secondary diagnoses. According to petitioner's medical

¹Petitioner is represented by Patrick Kevin Maroney, and respondent is represented by Jillian L. Moore and Steven K. Wellman.

records from 2018 through 2019, the diabetes caused petitioner to have diabetic polyneuropathy. Petitioner had no open ulcers or sores on either foot. However, there were decreased touch and vibration sensations in petitioner's feet. Petitioner complained of burning, tingling, and occasional numbness in the feet. Both tingling and numbness were found during examination.

Due to petitioner's January 20, 2020, work-related injury, the claims administrator held the instant claim compensable for a fracture of the right foot on February 4, 2020. Petitioner continued to see Dr. Sop following the surgical procedure.

On June 11, 2020, petitioner reported increased swelling in the right foot over the prior two days, and Dr. Sop gave petitioner a prescription for a custom-made boot for that foot. Dr. Sop also ordered x-rays of both of petitioner's feet. Timothy Aaron VanHoose, M.D., read the x-ray of the right foot as showing no complications with the hardware installed in the foot. Alignment was unchanged. However, Dr. VanHoose found a continued collapse of the mid right foot. Dr. VanHoose read the x-ray of the uninjured left foot as also revealing changes in the mid-foot, which were described as "degenerative." Dr. VanHoose stated that there was a collapse of the plantar arch in the left foot. Dr. Sop also interpreted the x-rays. Dr. Sop read the x-ray of the right foot, which is the only foot at issue in this claim, as showing a 7 mm plantar subsidence of the navicular bone since the interoperative films. Dr. Sop found that the x-ray of the uninjured left foot revealed a pes planus deformity with a subluxation of the midfoot at the talonavicular joint, "[c]onsistent with Charcot arthropathy." Dr. Sop's physical examination found a pes planus deformity in each of petitioner's feet. Therefore, Dr. Sop made a diagnosis of Charcot's joint and stated that petitioner had "Charcot deformity of the bilateral feet." Dr. Sop discussed with petitioner the possibility of a referral to a foot and ankle specialist as he might require additional surgery, "including reconstruction in the right foot with the arthrodesis."

Petitioner underwent another x-ray of his right foot on July 9, 2020. Matthew Wesley Morris, M.D., read the x-ray and found that the hardware installed in the foot was intact and unchanged in position. There was persistent medial and inferior subluxation of the navicular bone relative to the talus bone. Overall, the alignment of the midfoot was unchanged from the x-ray taken on June 11, 2020. At the July 9, 2020, follow-up appointment with Dr. Sop, Dr. Sop noted a history of bilateral Charcot's foot. Petitioner had swelling and stiffness in his joints. Petitioner also had joint swelling and stiffness at an August 6, 2020, follow-up appointment. It was noted that petitioner wears a custom-made boot on his right foot and uses a walker for longer distances. Dr. Sop released petitioner to return to work on August 24, 2020.

Petitioner underwent another x-ray of his right foot on September 17, 2020. Robert Charles Anton, M.D., found that the hardware installed in the foot was not failing or loosening. There was no change in alignment, no change in the subluxation of the navicular bone, no new fractures, and no soft tissue lesions. Dr. Sop also reviewed the x-ray and found that one of the screws in the right foot "to be loosened a few millimeters." Pes planus deformity was observed in the inferior subluxation of the navicular bone. Petitioner understood that "secondary to his Charcot neuropathy[,] . . . he is at risk for further progression of the deformity." However, Dr. Sop stated that petitioner may perform his activities without restriction, as tolerated, including working at full duty.

Petitioner was seen for an independent medical evaluation by David L. Soulsby, M.D., on September 22, 2020. Upon examination, petitioner had mild swelling in the right foot. The range of motion in the right foot was nearly normal. Dr. Soulsby found restricted motion in the hindfoot. There was also sensory impairment. However, Dr. Soulsby attributed the sensory impairment to petitioner's preexisting diabetes mellitus rather than to the compensable injury. Dr. Soulsby noted pes planus in the right foot and diagnosed petitioner with Charcot arthropathy in that foot. Dr. Soulsby determined that the compensable injury did not cause the Charcot arthropathy as Charcot arthropathy constituted a frequent complication of diabetes mellitus, and petitioner "has neuropathic change in both feet." Dr. Soulsby found decreased sensibility in the uninjured left foot, although no visible sign of deformity. Dr. Soulsby stated that there was a reasonable medical probability that any patient with diabetic polyneuropathy (such as petitioner) would develop Charcot arthropathy even in the absence of trauma. Therefore, Dr. Soulsby concluded that as the fracture dislocation was healed, petitioner achieved maximum medical improvement and required no additional treatment for the compensable injury and that Dr. Sop's request for a consultation with a foot and ankle specialist and possible reconstructive surgery was "solely because of the development of Charcot arthropathy." Relying upon Dr. Soulsby's report, the claims administrator denied Dr. Sop's request on September 28, 2020.

Petitioner protested the claims administrator's September 28, 2020, order,² and testified at deposition on March 18, 2021. Petitioner explained that he was controlling his diabetes and was never diagnosed with Charcot arthropathy prior to the January 20, 2020, compensable injury. Dr. Sop told petitioner that one of the screws installed in his right foot "backed out a little bit," but that they were going to "wait and watch and see what it did." Petitioner stated that he did not experience any problems due to the loose screw. When Dr. Sop discussed the possibility of a referral to a foot and ankle specialist for the Charcot arthropathy, petitioner did not want to go because, at that time, the specialists Dr. Sop suggested were in locations with a high rate of COVID-19. Petitioner testified that he wears a custom-made boot on his right foot most of the time, including at work, but even when petitioner wears the boot, there can be swelling in the right foot. Petitioner explained that he has difficulty in walking over uneven ground in the boot, which prevents him from resuming activities such as fishing, hunting, and doing yardwork. Petitioner opined that if his right foot were "fixed," he could engage in those activities again.

In its September 30, 2021, order, the Office of Judges affirmed the claims administrator's decision denying authorization for a consultation with a foot and ankle specialist and possible reconstructive surgery. The Office of Judges found that Dr. Sop's June 11, 2020, treatment notes did not indicate that such a consultation would be for the compensable injury. Charcot arthropathy did not constitute a compensable component of the instant claim. Therefore, the Office of Judges concluded that a consultation with a foot and ankle specialist and possible reconstructive surgery were not reasonably necessary and medically related to the compensable injury. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed on March 10, 2022.

²In its September 28, 2020, order, the claims administrator also granted petitioner a 3% permanent partial disability award based on Dr. Soulsby's report. However, permanent partial disability is not at issue in this appeal.

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).

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. “Pursuant to W. Va. Code § 23-4-1g(a) (2003) (Repl. Vol. 2010), a claimant in a workers’ compensation case must prove his or her claim for benefits by a preponderance of the evidence.” Syl. Pt. 2, *Gill v. City of Charleston*, 236 W. Va. 737, 783 S.E.2d 857 (2016).

After review, we find no error in the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Petitioner argues that the Office of Judges erred in affirming the denial of authorization for a consultation with a foot and ankle specialist and possible reconstructive surgery because the screws placed in his right foot are loosening and he continues to have swelling in his “feet.” However, petitioner testified that only one of the screws was loose, was not causing him any problems, and was being monitored. Petitioner’s reference to swelling in both of his “feet” is telling because the compensable injury involves only his right foot. At the June 11, 2020, follow-up appointment, at which Dr. Sop recommended a consultation with a foot and ankle specialist, Dr. Sop found Charcot arthropathy—a frequent complication of petitioner’s preexisting diabetes mellitus—in *both* of his feet. Therefore, as the medical evidence of record shows that the Charcot arthropathy is bilateral, petitioner fails to prove that a consultation with a foot and ankle specialist and possible reconstructive surgery were reasonably necessary and medically related to the compensable injury.

Affirmed.

ISSUED: January 25, 2024

CONCURRED IN BY:

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