

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

James A. Hughey,
Claimant Below, Petitioner

vs.) **No. 22-578** (BOR Appeal No. 2057951)
(JCN: 2022007062)

Penske,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner James A. Hughey appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent Penske filed a timely response.¹ The issues on appeal are compensability and medical treatment. In separate orders, both dated October 21, 2021, the claims administrator rejected the claim and denied authorization for physical therapy and a lumbar MRI. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the claims administrator's decisions in its February 28, 2022, order. The order was affirmed by the Board of Review on June 22, 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 for disposition in a memorandum decision that vacates the Board of Review's Order and remands for further proceedings.

Petitioner, a diesel mechanic employed by respondent, fell forward while changing a tire on a tractor trailer on August 25, 2021. Petitioner initially reported to CAMC Memorial Hospital on August 27, 2021, stating that he began experiencing lower back pain after he used a wrench "real hard." Upon examination, petitioner was tender to palpation on the lower back and left hip. Petitioner underwent x-rays of his lumbosacral spine, left hip, and pelvis. The x-ray of the lumbosacral spine revealed no acute bony injury with mild degenerative disc disease, at L4-L5 and L5-S1, and right convexity. The x-ray of the left hip and pelvis showed no fracture or dislocation, with hip joint spaces maintained, and spondylosis of the lower lumbar spine. Petitioner was diagnosed with an unspecified lower back injury. However, the treatment notes also referred to a "Back Sprain/Strain." Petitioner was instructed to follow up with John Orphanos, M.D., and to return if his symptoms worsened. The employers' report of injury reveals that respondent was notified of the August 25, 2021, incident on August 27, 2021, the day petitioner first sought medical attention.

¹Petitioner is represented by Reginald D. Henry, and respondent is represented by Aimee M. Stern.

Petitioner returned to CAMC Memorial Hospital on September 8, 2021, with worsening back pain from the August 25, 2021, incident. Petitioner reported that he sustained a fall at work, landing forward and straining his back. Petitioner was seen by Christopher Blake McKinless, D.O., who examined him. Dr. McKinless found that there was a “paraspinal muscle strain” at left L4. Dr. McKinless provided a diagnosis of sciatica of the left side with lumbar spine disorder. Dr. McKinless gave petitioner a return-to-work slip, dated September 8, 2021, stating that his injury was work-related and that he could resume work on September 11, 2021.

The employees’ and physicians’ report of injury was completed on September 8, 2021. In the employee’s section, petitioner indicated that on August 25, 2021, he was working on a tractor trailer when he injured his lower back by falling forward after a prybar slipped in his hand. Petitioner listed Luke Rollyson as a witness. In the physician’s section, the signature of the doctor is not legible. However, “C. McKinless, D.O.,” is listed as the physician, which corresponds to the September 8, 2021, treatment notes that showed that petitioner was seen by Dr. McKinless. On the form, Dr. McKinless indicated that petitioner suffered an occupational injury. Dr. McKinless stated that petitioner sustained a “[l]eft lumbar strain with sciatica” due to a fall. Dr. McKinless wrote “M54.32,” which is the diagnosis code for left side sciatica. Dr. McKinless restricted petitioner to modified duty (after September 11, 2021) with no heavy lifting above ten pounds or bending. Dr. McKinless referred petitioner to Dr. Orphanos.

Mr. Rollyson, petitioner’s coworker, provided an unnotarized signed statement on September 13, 2021. Mr. Rollyson stated that on August 25, 2021, at the midway point of changing the tires on a vehicle, petitioner told him his back was hurting. Petitioner also told Mr. Rollyson that he had injured his back at his previous location before his transfer to his present location.² Mr. Rollyson further said in his statement that petitioner never informed him that petitioner injured his back on August 25, 2021. Petitioner said only that his back was hurting. Mr. Rollyson stated that petitioner was able to finish his task, working an hour of overtime, before leaving for the day.

Petitioner was seen by Kylie Risendal, PA-C, a physician’s assistant in Dr. Orphanos’s office, on September 21, 2021. Ms. Risendal reviewed the x-rays taken at CAMC Memorial Hospital on August 27, 2021. There were no fractures with mild degenerative changes at L4-L5 and L5-S1 and a slight scoliotic curve. Ms. Risendal found that the range of motion of the lumbar spine was limited with regard to both flexion and extension. Straight leg raising was negative in the left lower extremity and positive in the right lower extremity. Ms. Risendal diagnosed petitioner with (1) low back pain; (2) degeneration of lumbar intervertebral disc; (3) pain radiating to the right leg; and (4) pain radiating to the left leg. Because conservative treatments were not exhausted, Ms. Risendal referred petitioner for physical therapy. Ms. Risendal explained that if petitioner did not improve with physical therapy, a lumbar MRI would be appropriate.

In separate orders, both dated October 21, 2021, the claims administrator rejected the claim and denied authorization for physical therapy and a lumbar MRI. In finding the claim non-

²Petitioner worked for respondent at two of its locations. Petitioner transferred to his current location on August 1, 2021, because it was closer to his home and he was able to save money on gasoline.

compensable, the claims administrator found that petitioner's healthcare providers "advis[ed] there is no information to indicate a work[-]related mechanism of injury." The order denying authorization for physical therapy and a lumbar MRI did not give a reason for the denial.

Despite the denial of authorization, petitioner underwent a lumbar MRI because his private insurance provided coverage. When Dr. Orphanos ordered the MRI, he provided a diagnosis of degeneration of lumbar intervertebral disc. The MRI occurred on November 19, 2021. Brian Markovich, M.D., who interpreted the MRI, found no evidence of an acute bony abnormality. There was dextrocurvature of the lumbar spine with multilevel degenerative changes, most pronounced at L5-S1, and a disc extrusion was causing abutment of the traversing right S1 nerve root. Moderate right and mild left foraminal stenosis was also present at L5-S1.

Petitioner requested an expedited hearing before the Office of Judges, which was held on January 27, 2022. Petitioner testified that he injured his lower back on August 25, 2021. Petitioner stated that about six months to a year before the August 25, 2021, incident, he had pulled a muscle in his upper back at his previous location. Petitioner returned to work two days after the earlier injury, by which time his symptoms had resolved themselves. Petitioner testified that he never had a recurrence of symptoms from the prior injury. Petitioner was not being treated for lower back pain on August 25, 2021. With regard to the August 25, 2021, injury, petitioner testified that he was using a four-foot-long steel prybar to dismount a tire from a vehicle, the prybar slipped in petitioner's hand, and he fell "forward onto my hands and knees onto the shop floor." Petitioner testified that he experienced severe pain in his back, could barely walk, and could not bend over. Petitioner stated that Mr. Rollyson was there when he injured himself, and he reported the injury to Mr. Rollyson. Petitioner stated that he finished his shift but had difficulty walking to his automobile, and his pain prevented him from going into work on August 26, 2021. Petitioner went to CAMC Memorial Hospital the morning of August 27, 2021. Petitioner stated that he has not been able to work since August 25, 2021.

In its February 28, 2022, order, the Office of Judges affirmed the claims administrator's decisions rejecting petitioner's claim and denying authorization for physical therapy and a lumbar MRI. The Office of Judges did not find that petitioner's testimony at the January 27, 2022, hearing lacked credibility, stating that "at least from [petitioner]'s perspective, on August 25, 2021, . . . he sustained a low back injury while changing tires on a tractor-trailer." However, the Office of Judges found that petitioner's testimony was not corroborated by the statement from Mr. Rollyson to whom petitioner stated he reported the injury. The Office of Judges further determined that "the record does not indicate that any physician has indicated that [petitioner] sustained as much as a lumbar sprain/strain attributable to the incident of August 25, 2021." Therefore, the Office of Judges concluded that "[a] preponderance of credible medical evidence" did not show that petitioner suffered a compensable injury. The Office of Judges did not independently analyze whether authorization should have been granted for physical therapy and a lumbar MRI because, "[i]f [petitioner] did not sustain a compensable injury to his low back on August 25, 2021, he is not entitled to medical benefits for any conditions allegedly arising therefrom." The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed the order on February 28, 2022.

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).

After review, we find that the Board of Review was clearly wrong because it mischaracterized the evidentiary record. “In order for a claim to be held compensable under the [Workers’] Compensation Act[, West Virginia Code §§ 23-1-1 to 23-6-3], three elements must coexist: (1) a personal injury (2) received in the course of employment [a]nd (3) resulting from that employment.” Syl. Pt. 1, *Barnett v. State Workmen’s Comp. Comm’r*, 153 W. Va. 796, 172 S.E.2d 698 (1970). The Board of Review clearly erred in finding that *no physician* had indicated that petitioner suffered a lumbar sprain/strain attributable to the incident of August 25, 2021. “Back Sprain/Strain” is referred to in the CAMC treatment notes for August 27, 2021. “Paraspinal muscle strain” was recorded in Dr. McKinless’s September 8, 2021, treatment notes. In the physician’s section of the employees’ and physicians’ report of injury, Dr. McKinless stated that petitioner suffered a “[l]eft lumbar strain,” and in the report of injury, as well as on the return-to-work slip he provided petitioner, Dr. McKinless indicated that petitioner sustained an occupational/work-related injury. Therefore, contrary to the Board of Review’s finding, at least one physician indicated that petitioner suffered a lumbar sprain/strain attributable to the August 25, 2021, incident.

While the Board of Review also found that petitioner’s testimony that he sustained an occupational injury was not corroborated by Mr. Rollyson’s statement,³ it is unclear whether the Board of Review would have affirmed the rejection of the instant claim if not for its finding that “[a] preponderance of credible *medical* evidence” showed that a compensable injury did not occur. (Emphasis added.) As explained above, the Board of Review mischaracterized the medical evidence. Given its incorrect finding with regard to the medical evidence, the Board of Review also failed to analyze whether authorization should have been granted for physical therapy and a lumbar MRI apart from its compensability determination.⁴ Accordingly, we vacate the Board of Review’s decision and remand the case to the Board with directions to evaluate the claim as to both compensability and medical treatment in light of the evidence in the record.

Vacated and Remanded with Directions.

³Respondent argues that petitioner’s own statements were inconsistent as to how the alleged injury occurred. However, that alleged inconsistency in petitioner’s own statements was not a ground on which the Board of Review affirmed the rejection of the claim. Because we remand this case for further proceedings, we do not pass upon issues not ruled on below.

⁴West Virginia Code § 23-4-3(a)(1) provides that the claims administrator must provide required sums for healthcare services that are medically related to the compensable injury.

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