STATE OF WEST VIRGINIA
INTERMEDIATE COURT OF APPEALS

DAVID DUFF, II,

Petitioner,

v.

KANAWHA COUNTY COMMISSION,

Respondent.

Intermediate Court No.: 22-ICA-10
JCN: 2021000317
Claim No.: 2021000317
DOI: 06/15/2020
BOR Order: 07/26/2022

BRIEF ON BEHALF OF RESPONDENT KANAWHA COUNTY COMMISSION

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I. STATEMENT OF THE CASE

David Duff, II ("Petitioner" or "Claimant") appeals the July 26, 2022 Order by the Board of Review ("BOR"), which affirmed the Claim Administrator's order dated June 17, 2021, which granted Claimant a 13% permanent partial disability ("PPD") award. Kanawha County Commission ("Respondent" or "Employer") files this brief in support of affirming the BOR's Order.

Claimant is a 49-year-old deputy sheriff for the Kanawha County Sheriff's department. On June 15, 2020, he and another deputy were lifting a bomb squad robot from the back of a truck when Claimant injured his back, left hip, and thighs.

A. Pre-Claim Medical Treatment

Claimant has a history of back problems, and the Employer submitted medical evidence documenting this history. (Exhibit A.) On September 26, 2018, he sought chiropractic treatment from Dr. Gabriel McKinney. Claimant reported having a lot of low back pain, stiffness in his legs, and difficulty with activities of daily living. (*Id.* at 4.) He filled out a Confidential Health History form indicating he first noticed symptoms when he

started working in 1999. (*Id.* at 1.) The case history notes he had low back pain/spams for the past 19 years. His diagnoses included segmental and somatic dysfunction of the lumbar region, and radiculopathy of the lumbar region, sacral and sacrococcygeal region. (*Id.* at 5.)

Claimant's chiropractic records reflect lumbar spine pain, soreness, tightness, swelling, and active trigger points from September 2019 through May 1, 2020. In fact, Claimant had low back complaints at his May 1, 2020 chiropractic visit, which was six (6) weeks before the work incident at issue in this claim. (*Id.* at 67-68.) At the May 1, 2020 visit, Claimant rated his pain as a 6 on a scale of 10. This rating applied to multiple levels of the spine, including the lumbar, sacral, and left sacroiliac regions. Dr. McKinney notably stated that Claimant's "current condition is further complicated by" various factors including degenerative disc disease. Short term goals for the ongoing treatment of Claimant's condition included improving Claimant's thoracolumbar range of motion ("ROM") by 50%, decreasing Claimant's pain and restoring Claimant's ROM, and achieving pain free activities of daily living. His diagnoses at that time included "M99.03 Seg and somatic dysf of lumbar reg; M54.16: Radiculopathy, lumbar reg; M99.04 Seg and somatic dsyf of sacal reg; and M54.17: Radiculopathy, lumbosacral reg."

B. <u>Post-Claim Medical Treatment</u>

On June 22, 2020, seven (7) days after the alleged June 15, 2020 work incident, Claimant saw Dr. McKinney, reporting he hurt his back lifting a TV stand and was having intense lower back pain, left leg pain, and left gluteal pain and spams. (Exhibit B.) There was no mention of a June 15 work incident. The records again note complicating factors such as degenerative disc disease and a past history of prior episodes. He returned to

Dr. McKinney the next day still limping, very sore and tight in his lower back, and tender in his left hip. Again, there was no mention of a back injury from a June 15 work incident. (Exhibit C.)

On June 23, 2020, Claimant saw Tina Beatty, MPAS, PA-C, complaining of left sided back pain and left leg pain. His assessment was lumbago with sciatica, left side. The record contains no mention of a June 15 work injury to the back. It was noted that Claimant wears a heavy gun belt, "but [there was] no known injury." (Exhibit D.)

Claimant saw Dr. McKinney on July 1, 2020 complaining of intense lower back pain and left leg pain. For the first time since June 15, 2020, Clamant attributed the pain to lifting a piece of equipment out of the back of a truck for work during some training. Icing was recommended, EMS was applied, and rehab exercises and stretching were prescribed. (Exhibit E.) He received chiropractic treatment. He returned on July 3, 2020 reporting no change. (Exhibit F.) On July 8, 2020, he complained of lower back pain, left leg pain, and spasms. (Exhibit G.)

Claimant had a lumbar spine MRI on July 14, 2020 that revealed a L3-L4 left foraminal/far left lateral disc protrusion causing moderate left neural foraminal narrowing. (Petitioner's Exhibit C.)

The claim was accepted for lumbar, left hip, pelvis, and sacrum strain. (Exhibit H.)

On July 15, 2020, Claimant reported to Dr. McKinney that he was having a lot of lower back pain and left leg pain and he could not drive, sit, or stand for any amount of time without pain. (Exhibit I.) On July 20, 2020, Claimant reported to Dr. McKinney that the treatment was finally starting to help some. He was still having pain, spasms, and tightness, but he was able to drive and he was walking better. (Exhibit J.) On July 27,

2020 Claimant stated the decompression and treatment were helping a lot. (Exhibit K.) On July 31, 2020, Claimant reported a new symptom of intense burning from his left groin to his left knee. (Exhibit L.)

On August 5, 2020, Claimant saw Dr. Robert Crow for pain in his left hip/buttock area that radiates into the left thigh stopping at the left knee. Dr. Crow reviewed the MRI and found multilevel spondylitic changes throughout the lumbar spine and multiple disc degeneration in addition to the disc protrusion at L3-L4. His impression was that Claimant was overweight and had intervertebral disc disorders with radiculopathy in the lumbar region and spinal stenosis of the lumbar region. Dr. Crow recommended a left L3 TF ESI and physical therapy. (Exhibit M.)

Claimant underwent left lumbar L3 TF ESI on August 19, 2020. (Exhibit N.)

On September 16, 2020, he followed up with Dr. Crow reporting 10 days of very good pain relief after his ESI, but the pain returned and is quite severe. He reported he was too uncomfortable to proceed with physical therapy. He wanted to undergo L3-4 PLIF (posterior lumbar interbody fusion). (Exhibit O.)

Claimant underwent L3-4 PLIF on November 3, 2020. (Exhibit P.) At his November 30, 2020 follow up with Dr. Crow, Claimant reported he was very happy with the outcome of his surgery and he had complete resolution of his left leg pain. He reported some paresthesias over the anterior left thigh and some weakness in the left quad and knee on stepping. Dr. Crow wanted Claimant to continue physical therapy. He was returned to work on light duty on November 30, 2020. Dr. Crow expected he would be able to return to work full duty in 3 months, if not sooner. (Exhibit Q.)

At Claimant's March 19, 2021 follow up with Dr. Crow, he reported complete resolution of his left leg pain, but some continued intermittent paresthesias over the anterior left thigh and also weakness in the left quad and knee on stepping. His primary issue was mechanical instability of the left knee and knee buckling when going up or down steps or grade. Dr. Crow believed it would be unsafe for Claimant to go back to work full duty as a sheriff's deputy. (Exhibit R.)

Dr. Mukkamala performed an independent medical examination ("IME") on June 9, 2021. (Petitioner's Exhibit D.) Claimant complained of occasional low back pain and left leg buckling/giving out due to weakness. Dr. Mukkamala found Claimant has reached maximum medical improvement ("MMI") and needs no further treatment other than continuation of a home exercise program. He recommended Claimant continue modified duty for at least another 6 months and then his work capacity could be re-evaluated. Using the AMA Guides, 4th Edition, Figures 79 and 80, Dr. Mukkamala rated 8% whole person impairment ("WPI") for lost range of motion ("ROM"). Because Claimant had lumbar fusion and continues to have symptoms, he qualifies for 12% WPI under Table 75 on page 113. For the left quadriceps weakness, he rated 3% WPI. The combined ratings for the low back and lumbar spine totaled 21% WPI which was adjusted per Rule 20 to 25% WPI. Dr. Mukkamala opined the 25% WPI resulted from preexisting degenerative spondyloarthropathy as well as the compensable injury. He apportioned 12% WPI to the preexisting conditions and 13% WPI to the compensable injury.

Claimant was awarded 13% PPD on June 17, 2021, and Claimant filed a protest. (Exhibit S.)

On August 18, 2021, Claimant saw Dr. Crow reporting complete resolution of his left leg pain. He reported he had been stable over the last five (5) months and he wanted to go back to work full duty as a deputy sheriff. Dr. Crow found that he was stable, both radiographically and clinically over the last six (6) to eight (8) months. (Exhibit T.)

Claimant's Evidence

Claimant submitted the July 14, 2020 lumbar spine MRI report. He also submitted a deposition transcript from Dr. Mukkamala concerning a different claim for a different claimant in 2016. (Petitioner's Exhibit G.)

Claimant submitted a July 28, 2021 IME report from Dr. Bruce Guberman. (Petitioner's Exhibit F.) Claimant reported to Dr. Guberman continued symptoms in his low back, numbness and tingling over the anterior aspect of both legs to the knees, and some intermittent left knee pain. Claimant also reported decreased sensation in the left leg below the knee and the bottoms of both feet as well as weakness and instability of his left leg. He returned to work in December 2020 or January 2021 doing office work. He reported he now works security at the Judicial Annex and assists at the front door.

Claimant reported he had occasional low back pain prior to this injury. He had seen Dr. McKinney intermittently when he began working in the police department. However, Claimant told Dr. Guberman that before this injury, the pain had never radiated into his legs, and he had never had numbness, tingling or weakness in his legs.

Dr. Guberman opined Claimant has reached MMI and needs no further treatment. Using the AMA Guides, 4th Edition, Table 75, page 113, Dr. Guberman rated 12% WPI for the lumbar spine. He also rated 14% WPI for range of motion abnormalities of the lumbar spine. Additionally, he rated 1% WPI for sensory abnormalities of the lower

extremities. Dr. Guberman combined the ratings for a total of 25% WPI per Rule 20. He further opined that although Claimant had imagining studies that revealed evidence of degenerative joint and disc disease of the lumbar spine which was present before the injury, he would not have qualified for any impairment rating before the current injury because his occasional lumbar spine pain did not radiate into his legs and he did not have numbness, tingling, or weakness in his legs due to the low back pain before the injury. Dr. Guberman opined Claimant's pre-injury low back pain was only intermittent and did not cause ongoing significant interference with his activities of daily living, functional limitations, or interference with work. Dr. Guberman does not believe there is an objective medical, logical rationale for determining any specific portion of the impairment to apportion for any preexisting conditions.

Dr. Guberman apportioned his entire 25% WPI rating to this injury. Because Claimant has already received a 13% WPI rating, Dr. Guberman recommended he receive an additional 12% WPI for the injury.

Employer's Rebuttal Evidence

The Employer submitted a December 1, 2021 IME report from Dr. David Soulsby. (Petitioner's Exhibit H.) Like Dr. Mukkamala, Dr. Soulsby found 25% WPI, but apportioned 12% to Claimant's preexisting disease process and 13% to the compensable injury. He noted Claimant had preexisting spondyloarthropathy in the lumbar spine, which the medical records reflect was symptomatic and required medical treatment. Dr. Soulsby opined that, even if the preexisting process was not previously symptomatic, it is expected that degenerative disc disease will cause lost motion. Therefore, because the preexisting process affects motion, it contributes to the observed impairment and apportionment is

required. Citing the NCBI, Dr. Soulsby noted that the presence of degenerative disc disease increases the probability that a disc herniation will occur. Dr. Soulsby opined that, not only does preexisting spondyloarthropathy contribute to Claimant's observed loss of motion, but it was also a contributor in causing the disc herniation itself. In fact, he noted there is a reasonable medical probability that Claimant's disc herniation would not have occurred in the absence of his spondyloarthropathy.

Dr. Soulsby noted that he documented Claimant's uninjured and asymptomatic cervical spine range of motion and found it was decreased by approximately 30% of known normal findings. Thus, Dr. Soulsby opined there was a reasonable probability Claimant has degenerative disc disease in the cervical spine. There were no cervical imaging studies available, so the severity of Claimant's preexisting condition is unknown. Although the cervical spine is not the lumbar spine, and it cannot be assumed that the cervical spine represents a reasonable approximation of the preexisting disease in the lumbar spine, Dr. Soulsby explained "the observed loss of motion in an asymptomatic region clearly demonstrates that apportionment is required and that Dr. Guberman's exclusion of apportionment is not based on sound medical reasoning."

By Order dated July 26, 2022, the Board of Review affirmed the June 17, 2021 order that granted Claimant a 13% PPD award. The BOR held that Claimant failed to establish by a preponderance of evidence that he sustained more compensable impairment than the 13% found by Dr. Mukkamala and supported by Dr. Soulsby. Claimant filed this appeal.

II. SUMMARY OF ARGUMENT

The preponderance of the evidence shows Claimant was properly compensated by the 13% PPD award based on the analysis of expert examiners who allocated for the preexisting impairment documented by pre-injury treatment records.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Employer submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT

A. Standard of Review

The Intermediate Appellate Court "shall reverse, vacate, or modify [an] order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are: (1) [i]n violation of statutory provisions; (2) [i]n excess of the statutory authority or jurisdiction of the Board of Review; (3) [m]ade upon unlawful procedures; (4) [a]ffected by other error of law; (5) [c]learly wrong in view of the reliable, probative, and substantial evidence on the whole record; or (6) [a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." W. Va. Code §23-5-12a(b).

B. The BOR was not clearly wrong in finding that allocation for preexisting impairment is warranted and that Claimant is therefore entitled to no more than the 13% PPD granted by the Claim Administrator.

A claimant in a workers' compensation proceeding has the burden of proving his claim. *See e.g.*, Syl. pt. 2, *Clark v. State Workmen's Compensation Com'r*, 155 W. Va. 726, 187 S.E.2d 213, 214 (1972); Syl pt. 1, *Staubs v. S.W.C.C.,* 153 W. Va. 337, 168

S.E.2d 730 (1969). "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." Syllabus point 1, *Arch Coal, Inc. v. Jimmie Lemon*, 240 W.Va. 650, ___, 814 S.E.2d 667, 668 (2018)(quoting Syl. pt. 2, *Gill v. City of Charleston*, 236 W.Va. 737, 783 S.E.2d 857 (2016)).

Pursuant to W. Va. Code § 23-4-6(i), the degree of permanent partial disability "shall be determined exclusively by the degree of whole body medical impairment" a claimant has sustained, which is to be evaluated in accordance with standards adopted by the Insurance Commissioner. Such standards are found at W. Va. C.S.R. § 85-20-64, et seq. All evaluations, examinations, reports, and opinions with regard to the degree of permanent whole body medical impairment which an injured worker has suffered shall be conducted and composed in accordance with the "Guides to the Evaluation of Permanent Impairment," (4th ed. 1993), as published by the American Medical Association. W.Va. C.S.R. §85-20-65.1. The evidentiary weight to be given to a report will be determined by how well it demonstrates that the evaluation and examination that it memorializes were conducted in accordance with the applicable Guides and that the opinion with regard to the degree of permanent whole body medical impairment suffered by an injured worker was arrived at and composed in accordance with the requirements of the applicable Guides. W.Va. C.S.R. §85-20-66.1.

In evaluating a disability of a claimant, it is the administrative law judge's duty to examine the physical findings of the examining physicians and determine from that and all other evidence in the case what award, if any, the claimant should be granted. *McGeary v. State Workmen's Compensation Director*, 148 W. Va. 436, 135 S.E.2d 345

(1964); *Haines v. Workmen's Compensation Commissioner*, 151 W. Va. 152, 150 S.E.2d 883 (1966); *Stewart v. State Workmen's Compensation Commissioner*, 155 W. Va. 633, 186 S.E.2d 700 (1972).

Claimant argues that the statute and regulations require that impairment be calculated using the ROM Model from the AMA Guides 4th Edition. Claimant asserts that preexisting impairment can therefore be calculated *only* with ROM test data performed prior to the injury of June 15, 2020. W. Va. C.S.R. §85-20-65.1 *et seq*. does provide for use of the ROM Model of the AMA Guides 4th Edition in the conduct of an examination aimed at determining a claimant's current level of impairment. As a practical consideration, recording of ROM measurements is not routinely practiced by physicians outside the context of an independent medical examination. Consequently, ROM data taken under the criteria of the Guides' ROM Model is typically not available outside the independent medical examination context. Nevertheless, examiners are mandated to determine the nature and extent of any factors other than the compensable injury that may be affecting a claimant's impairment. W. Va. C.S.R. §85-20-66.4. A claimant's medical history, as established by historical medical records, is obviously a crucial factor in making such determinations. Importantly, preexisting impairment "may be established at any time by competent medical or other evidence," pursuant to W. Va. Code § 23-4-9b. Moreover, W. Va. C.S.R. §85-20-65.1 permits a provider to rate impairment in the event the Guides "cannot be appropriately applied." In that event, the examiner is required to "explain the basis for that opinion."

Here, the overwhelming competent medical evidence of record demonstrates the Claim Administrator properly awarded 13% PPD based on Dr. Mukkamala's Guides-

based impairment rating and credible apportionment opinion, which was supported by Dr. Soulsby's report. Dr. Mukkamala and Dr. Soulsby credibly explained the bases for their apportionment opinionsja . Dr. Guberman's lack of any apportionment of impairment to preexisting degenerative conditions renders his opinion invalid. The medical records show that Claimant has had lumbar spine problems for many years and he first noticed symptoms when he started working in 1999. He also reported to his chiropractor in 2018 that he had low back pain/spasms for the past 19 years. He has been receiving chiropractic treatment for his lumbar spine since September 26, 2018, almost 2 years prior to the work injury at issue in this claim. This treatment was active and ongoing immediately prior to the work incident in this claim.

The last chiropractic visit prior to the work injury clearly shows that Claimant had restricted ROM and significant spinal pain (level 6 out of 10) which adversely affected his activities of daily living. This longstanding and ongoing status was such that medical records immediately after June 15, 2020 indicate Claimant did not consider himself to have sustained a new injury at all, let alone a significant one that changed his medical status. Dr. Crow, the neurosurgeon, stated the MRI showed multilevel spondylitic changes throughout the lumbar spine and multiple disc degeneration in addition to the disc protrusion at L3-L4. He opined that Claimant was overweight and had intervertebral disc disorders with radiculopathy in the lumbar region and spinal stenosis of the lumbar region. Recall that Dr. McKinney's pre-injury notes repeatedly reference radiculopathy and describe Claimant degenerative disc disease as a complicating factor. Dr. Guberman's report reflects that he did not review any of these pre-injury medical records, thereby damaging the credibility and reliability of his opinion.

A preponderance of evidence shows that Dr. Mukkamala and Dr. Soulsby properly considered all available information and apportioned Claimant's whole person impairment to account for his preexisting lumbar spine disease process. Because Drs. Mukkamala and Soulsby both properly apportioned for preexisting conditions and found 13% WPI attributable to the compensable injury, their reports are more credible than Dr. Guberman's report, which failed to take into account Claimant's preexisting lumbar spine disease.

The BOR properly found that Dr. Guberman's report, which states that Claimant would not have qualified for any impairment rating prior to the current injury, is based on incomplete evidence. Moreover, there is no medical opinion of record that is both based on complete evidence and refutes Dr. Mukkamala's apportionment analysis. The BOR cited the Memorandum Decision in *Scott v. Welded Construction, LP*, No. 19-1164 as supportive of apportionment, even in the event of a spinal fusion such as Claimant underwent. Claimant argues in his brief that classification in Category V based on a fusion entitles him to a 25% award based on the fusion alone, irrespective of his ROM loss. However, in *Scott*, an apportionment of 10% was affirmed based on a prior 10% award for an injury at a different lumbar level than that where the fusion occurred. Thus, based on the *Scott* opinion, the BOR in this claim reasoned that the lumbar spine is to be assessed in its entirety and that apportionment is to occur when appropriate.

V. CONCLUSION

Claimant has failed to show that the BOR's Order was (1) [i]n violation of statutory provisions; (2) [i]n excess of the statutory authority or jurisdiction of the Board of Review; (3) [m]ade upon unlawful procedures; (4) [a]ffected by other error of law; (5) [c]learly

wrong in view of the reliable, probative, and substantial evidence on the whole record; or (6) [a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. For all the foregoing reasons, the Employer respectfully requests this Court affirm the July 26, 2022 Board of Review decision that affirmed the Claim Administrator's June 17, 2021 order granting Claimant a 13% PPD award.

Respectfully submitted,

KANAWHA COUNTY COMMISSION

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CERTIFICATE OF SERVICE

I, Charity K. Lawrence, do hereby certify that the foregoing "**BRIEF ON BEHALF OF RESPONDENT KANAWHA COUNTY COMMISSION"** has been served upon all parties via electronic filing on this 1st day of September 2022 as follows:

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