

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**Edward Stumpf,**  
**Claimant Below, Petitioner**

vs.) **No. 22-0274** (BOR Appeal No. 2057482)  
(JCN: 2019016047)

**Nuverra Environmental Solutions,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Edward Stumpf appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent Nuverra Environmental Solutions filed a timely response.<sup>1</sup> The issues on appeal are compensability and entitlement to temporary total disability benefits. The claims administrator denied a request to add a traumatic complete tear of the left rotator cuff as a compensable component of the instant claim on February 1, 2021. The claims administrator closed the instant claim for temporary total disability benefits, effective December 22, 2020, on February 19, 2021. The Workers' Compensation Office of Judges ("Office of Judges") affirmed both of the claims administrator's decisions in its October 6, 2021, order. The order was affirmed by the Board of Review on March 18, 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.

Petitioner, a truck driver, suffered multiple injuries in the course of and resulting from his employment on January 18, 2019, when the truck he was driving malfunctioned and rolled over a seventy-five-foot embankment. In January 19, 2019, treatment notes from Ruby Memorial Hospital, Gregory P. Schaefer, D.O., noted that petitioner was complaining of bilateral shoulder pain. The pain was worse in the right shoulder than in the left shoulder. However, no shoulder condition was included in the claims administrator's order issued on February 15, 2019. Instead, the claims administrator held the instant claim compensable for (1) a lung contusion; (2) multiple rib fractures; (3) nondisplaced fracture, third metacarpal, left hand; (4) closed fracture, left distal fibula; (5) chin laceration; and (6) contusion, left periorbital region. The claims administrator noted that payment of temporary total disability benefits commenced on January 29, 2019.

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<sup>1</sup>Petitioner is represented by Christopher J. Wallace, and respondent is represented by Maureen Kowalski.

Petitioner underwent an MRI/arthrogram of the left shoulder on May 19, 2020. Adam Trybus, Jr., M.D., noted both postsurgical changes and mild degenerative changes. In addition, there were small partial-thickness undersurface and interstitial tears seen in the supraspinatus and infraspinatus tendons, along with an interstitial tear in the supraspinatus musculotendinous junction. Dr. Trybus found that “due to the previous surgery [petitioner had]” in 2015, “[t]he superior labrum is blunted and the intra-articular portion of [the] biceps tendon is not seen.” Dr. Trybus stated that “[a] tear is seen in the remaining superior labrum” and that the anterior labrum could also have a tear.

Petitioner was seen for an independent medical evaluation on September 30, 2020, by Victoria M. Langa, M.D. Despite the fact that a cervical sprain was not included in the claims administrator’s February 15, 2019, order, Dr. Langa listed a cervical sprain as among the compensable components of the instant injury. Dr. Langa diagnosed petitioner with left C5 radiculopathy “plus/minus intrinsic left shoulder pain” and further assessed petitioner as being status post arthroscopy and rotator cuff repair due to a 2015 injury with residual chronic weakness in the left shoulder. Dr. Langa found that the findings reported on the May 19, 2020, MRI/arthrogram were not related to the instant compensable injury. Dr. Langa stated that if the instant compensable injury had aggravated a preexisting condition, complaints of shoulder problems would have started at the time of the injury instead of several months later.

Petitioner was seen for an independent medical evaluation on December 10, 2020, by Christopher Martin, M.D. Despite the fact that no shoulder condition was included in the claims administrator’s February 15, 2019, order, Dr. Martin listed a left shoulder sprain and post-traumatic adhesive capsulitis of the left shoulder as among the compensable components of the instant injury. Like Dr. Langa, Dr. Martin also listed a cervical sprain as a compensable injury. Dr. Martin noted that in 2015, petitioner underwent arthroscopic surgery for a left shoulder injury in a prior workers’ compensation claim. Petitioner fully recovered and received no permanent partial disability because of the prior injury. During the evaluation, petitioner experienced bilateral shoulder pain, but it was worse in the left shoulder. According to treatment notes reviewed by Dr. Martin, petitioner also reported bilateral shoulder pain the day after the instant compensable injury. Dr. Martin found that petitioner was at maximum medical improvement regarding the instant compensable injury, including the two shoulder conditions and the cervical sprain Dr. Martin listed as included in the claim. Dr. Martin assessed petitioner as having 5% impairment in the left shoulder. Dr. Martin determined two-fifths of the 5% impairment were caused by preexisting degenerative disease and the 2015 injury and attributed 3% impairment to the instant compensable injury “if the left shoulder is considered as a compensable diagnosis under this claim.” Dr. Martin stated that he did not believe that petitioner’s left shoulder problems were related to the instant compensable injury. Dr. Martin also found that petitioner had generalized osteoarthritis that affected both of his shoulders.

Because Dr. Martin also assessed petitioner as having impairment for his left fibula fracture and associated tears in the ankle, Dr. Martin gave petitioner 8% total impairment. On December 21, 2020, the claims administrator awarded petitioner 8% permanent partial disability, which included the 3% that Dr. Martin allocated to the instant compensable injury based on the

assumption that the left shoulder sprain would be considered as a compensable diagnosis under this claim.<sup>2</sup>

On December 28, 2020, Joshua Port, M.D., submitted a diagnosis update and requested that a traumatic complete left rotator cuff tear be added as a compensable condition in the instant claim. For documentation, Dr. Port referred to the May 19, 2020, MRI/arthrogram and his treatment notes. Dr. Port's September 2, 2020, treatment notes reflected that petitioner was having left shoulder pain. Dr. Port diagnosed petitioner with a traumatic complete tear of the left rotator cuff. Dr. Port noted that petitioner's 2015 surgery was a rotator cuff repair. Dr. Port stated that a revision rotator cuff repair was required and that petitioner would achieve maximum medical improvement in twelve to eighteen months after the procedure.

On January 14, 2021, the claims administrator requested Dr. Martin to review the May 19, 2020, MRI/arthrogram and give his opinion as to whether a traumatic complete left rotator cuff tear should be added as a compensable component of the instant claim. In a January 27, 2021, addendum report, Dr. Martin determined that the tears revealed on the May 19, 2020, MRI/arthrogram were not related to the instant compensable injury. Dr. Martin initially found that petitioner's medical records did not show that petitioner "was consistently reporting the type of left shoulder symptoms one would expect had he experienced a traumatic rotator cuff tear from his injury of January 18, 2019," and there was "no plausible medical explanation as to why these complaints would be delayed by months following any causative injury." In addition, Dr. Martin concluded that the observation of a rotator cuff tear in a person of petitioner's age<sup>3</sup> did not mean that the tear was caused by recent trauma and that any tear seen on the MRI/arthrogram may indicate that the 2015 rotator cuff repair due to petitioner's prior injury failed to remain intact. To support these conclusions, Dr. Martin attached a medical article to his addendum report. Thereafter, the claims administrator denied Dr. Port's request to add a traumatic complete left rotator cuff tear as a compensable condition on February 1, 2021. Petitioner protested this order.

Petitioner was seen on February 8, 2021, by William Bergin, D.O. Dr. Bergin stated that petitioner was transitioning into his care from another physician. Like Dr. Port, Dr. Bergin recommended a surgical referral after diagnosing petitioner with left shoulder pain. Dr. Bergin stated that after any future course of treatment was completed, petitioner would need a functional capacity evaluation.

Because Dr. Martin found petitioner at maximum medical improvement in his original December 20, 2020, report, the claims administrator entered an order on February 19, 2021, closing the claim for temporary total disability benefits effective December 22, 2020. Petitioner protested this order.

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<sup>2</sup>Permanent partial disability is not at issue in this appeal.

<sup>3</sup>Petitioner was born in 1957.

Petitioner testified at a March 31, 2021, deposition. Petitioner stated that he did not return to work after the instant compensable injury. Petitioner said that he previously received a 20% disability from the United States military due to two ruptured discs in his back during his military service.<sup>4</sup> Petitioner stated that he applied for Social Security disability benefits but had not been awarded such benefits at the time of his deposition. However, petitioner testified that Joshua Muetzel, M.D., released him to return to work at light duty on June 10, 2020. Petitioner explained that he did not resume working because he “was being seen by several different doctors,” and Dr. Muetzel was treating him only for certain compensable conditions. Petitioner stated that Dr. Port determined that he could perform light-duty work with a lifting restriction of twenty pounds. However, petitioner testified that he was “very limited” in his activities and that he was able to “only stand for a certain period of time.”

Petitioner stated that Dr. Port and Dr. Bergin each recommended surgery for his left shoulder but that he saw Dr. Bergin only once. Petitioner said that while the 2015 left shoulder injury was work-related, he healed completely following the surgical repair. Petitioner testified that he did not have any restrictions on his work activities after the 2015 surgery. Petitioner stated that he remembered having pain in his left shoulder the day after the instant compensable injury. Petitioner explained that he did not frequently complain of shoulder problems immediately after the accident because of the extensive injuries to the left side of his body and his relative immobility following the crash. Petitioner stated that as his activity increased following the accident, the pain in his left shoulder became more significant.

In its October 6, 2021, order, the Office of Judges affirmed the claims administrator’s decisions to close the instant claim for temporary total disability benefits and to deny the request to add a traumatic complete left rotator cuff tear as a compensable condition. The Office of Judges found that Dr. Martin assessed petitioner to be at maximum medical improvement regarding the instant compensable injury and that Drs. Martin and Langa each stated that a traumatic complete rotator cuff tear was not related to the compensable injury. Therefore, the Office of Judges concluded that the instant claim was properly closed for temporary total disability benefits and that petitioner did not suffer a traumatic complete left rotator cuff tear due to the instant compensable injury. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed the order on March 18, 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

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<sup>4</sup>The parties dispute the relevancy of a November 18, 1993, treatment note from the Veterans Administration, which indicated that petitioner was in a motor vehicle accident in 1974. However, while the Office of Judges summarized the contents of the treatment note during its recitation of the facts, it did not mention that note in its legal analysis of the issues before it. Therefore, the treatment note played no part in the Office of Judges’ affirmation of the claims administrator’s February 1, 2021, and February 19, 2021, orders.

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).

Temporary total disability constitutes “[an] inability to return to substantial gainful employment requiring skills or activities comparable to those of one’s previous gainful employment during the healing or recovery period after injury.” *Allen v. Worker’s Comp. Comm’r*, 173 W. Va. 238, 242, 314 S.E.2d 401, 405 (1984). West Virginia Code § 23-4-7a(e) provides, in pertinent part, that a finding that “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.” In Syllabus Point 1 of *Barnett v. State Workmen’s Compensation Commissioner*, 153 W. Va. 796, 172 S.E.2d 698 (1970), we held that “[i]n 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.”

After review, we find no error in the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. The instant claim was properly closed for temporary total disability benefits under West Virginia Code § 23-4-7a(e) as Dr. Martin had found petitioner to be at maximum medical improvement. Nevertheless, petitioner argues that if a traumatic complete left rotator cuff tear is a compensable condition, he is entitled to temporary total disability benefits because of that condition.<sup>5</sup> In his January 27, 2021, addendum report, Dr. Martin found that a traumatic complete left rotator cuff tear was not related to the instant compensable injury due to (1) a lack of consistent complaints about the left shoulder immediately following the injury; (2) petitioner’s age being an indicator that any tear was not caused by recent trauma; and (3) the fact that petitioner’s 2015 rotator repair may have failed to remain intact. To support his conclusions, Dr. Martin referenced petitioner’s medical records and attached a medical article to his addendum report. Therefore, a traumatic complete left rotator cuff tear is not a compensable condition, which would entitle petitioner to temporary total disability benefits.

Affirmed.

**ISSUED: February 20, 2024**

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<sup>5</sup>More generally, the parties dispute which other conditions are included in the instant claim because Dr. Martin listed three conditions, and Dr. Langa listed one condition, as among the compensable components of the instant claim that the claims administrator did not include in its February 15, 2019, order. However, we do not need to address that dispute because this appeal concerns only whether petitioner is entitled to temporary total disability due to the alleged compensability of a traumatic complete left rotator cuff tear.

**CONCURRED IN BY:**

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