

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

JAMES D. HORNER,
Claimant Below, Petitioner

FILED
March 25, 2024

v.) No. 23-ICA-497 (JCN: 2020025626)

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

EASTERN ASPHALT PRODUCTS, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner James D. Horner appeals the October 23, 2023, order of the Workers' Compensation Board of Review ("Board"). Respondent Eastern Asphalt Products, LLC, ("EAP") filed a response.¹ Mr. Horner did not file a reply. The issue on appeal is whether the Board erred in affirming the claim administrator's orders, which granted Mr. Horner a 4% permanent partial disability ("PPD") award and a 10% PPD award, for a total of 14% PPD.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2022). After considering the parties' arguments, the record on appeal, and the applicable law, this Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the Board's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Prior to the compensable injury, on September 5, 2013, Mr. Horner was seen for back pain at Bluestone Health, and the assessment was joint pain and back spasms. On September 6, 2013, Mr. Horner underwent x-rays of his cervical, lumbar, and dorsal spine, revealing mild compression fractures of T11 and T12 vertebrae and mild anterior osteophyte formation at T11-T12, T12-L1, and L2. On September 19, 2013, Mr. Horner underwent an MRI of the cervical spine, revealing cervical kyphosis with C5-C6 degenerative disc disease resulting in mild central spinal canal stenosis; no myelomalacia or intramedullary signal abnormality; and no abnormal postcontrast enhancement. Records from 2013 and 2014 indicate that Mr. Horner was in a motor vehicle accident in 2009 and he had reported persistent neck and back pain since that time.

In March 2017, Mr. Horner was seen at MedExpress several times for bilateral shoulder pain and limited range of motion in the left shoulder due to pain. A report of MRI

¹ Mr. Horner is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq. EAP is represented by Jeffrey M. Carder, Esq.

of the left shoulder dated April 6, 2017, revealed suboptimal quality to large body habitus and motion artifacts, no acute bony lesions at the left shoulder, mild supraspinatus tendonitis, no evidence of a full or partial thickness tear, and intact glenoid labrum and biceps tendon.

In regard to the current compensable injury, Mr. Horner fell from a truck due to a loose step on June 9, 2020, and suffered injuries to his shoulders, neck, back, ribs, and right elbow, while employed by EAP. Mr. Horner completed an Employees' and Physicians' Report of Occupational Injury dated June 12, 2020. The claim administrator issued an order dated June 22, 2020, holding the claim compensable for sprain of the elbow, forearm, and shoulder. (The claim administrator issued a corrected order dated July 1, 2021, which added cervical, thoracic, lumbar, and bilateral shoulder sprains and a left shoulder tear of the supraspinatus tendon to the claim.)

On July 5, 2020, Mr. Horner underwent an MRI of the thoracic spine revealing multiple level disc bulges in the thoracic regions, approximately 30% loss in height at T12 vertebral body, depression of superior endplate, moderate posterior disc diffuse protrusion compressing the thecal sac and the thoracic cord, broad-based disc protrusion, narrowing of the disc space, and slight increase in dorsal kyphosis of the lower thoracic spine approximately at T12-L1 level. A left shoulder MRI was performed on September 2, 2020, revealing moderate supraspinatus tendinopathy.

Mr. Horner underwent a CT of the left shoulder on March 1, 2021, revealing linear contrast extravasation in the subacromial bursa consistent with a tear of the supraspinatus tendon likely at its insertion, and no gross evidence of tendon retraction seen. A right shoulder CT scan the same day was normal with no tears. An MRI of the lumbar spine was performed on May 17, 2021, revealing an interval mild decrease in height of the disc space with associated degenerative disc desiccation at L1-L2, an interval minimal disc bulge at L1-L2, no focal disc protrusions, suggestion of minimal hypertrophy of some of the lumbar facets, and no significant narrowing of the lumbar spinal canal or the neural foramina.

On June 4, 2021, Mr. Horner underwent a left shoulder arthroscopy with repair rotator cuff extended service, subacromial decompression, and insertion nonabsorbable pain administration device surgery. The post-operative diagnosis was a left shoulder partial-thickness rotator cuff tear with impingement.

On March 16, 2022, Mr. Horner was evaluated by Joseph Grady, II, M.D. Dr. Grady assessed cervical sprain, thoracic sprain, lumbar sprain, right shoulder sprain, left elbow sprain, and status post rotator cuff repair surgery on the left shoulder. Dr. Grady opined that Mr. Horner was at maximum medical improvement ("MMI") for his compensable injuries. Using the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) ("*Guides*"), Dr. Grady found that Mr. Horner had 1% whole person impairment ("WPI") related to the right shoulder, 5% WPI related to the left

shoulder, and 0% WPI related to the left elbow. Dr. Grady apportioned 2% WPI from the left shoulder to preexisting conditions and symptoms. Ultimately, Dr. Grady found that Mr. Horner had a total of 4% WPI related to the compensable injury to the bilateral shoulders. The claim administrator issued an order dated June 14, 2022, granting Mr. Horner a 4% PPD award for the bilateral shoulders. Mr. Horner protested this order.

Dr. Grady authored an addendum report dated July 28, 2022. Dr. Grady found that Mr. Horner had a 7% WPI related to the cervical spine, 5% WPI related to the thoracic spine, and 5% WPI related to the lumbar spine. Dr. Grady apportioned 4% WPI of the thoracic spine and 2% WPI of the lumbar spine due to preexisting degenerative conditions and symptoms. Dr. Grady noted the pre-injury and post-injury imaging studies revealed degenerative changes in the spine and that Mr. Horner had a prior medical history of symptoms and treatment in his left shoulder. Dr. Grady also reviewed medical treatment records dating to 2017. Ultimately, Dr. Grady found that Mr. Horner had a total combined WPI of 10% for the cervical, thoracic, and lumbar spine. The claim administrator issued an order dated August 16, 2022, granting Mr. Horner a 10% PPD award for the cervical, thoracic, and lumbar spine. Mr. Horner protested this order.

On January 3, 2023, Mr. Horner was evaluated by Michael Kominsky, D.C. Using the *Guides*, Dr. Kominsky found that Mr. Horner had a combined 8% WPI of the left upper extremity for the left shoulder and left elbow, 8% WPI related to the lumbar spine, 8% WPI related to the cervical spine, and 5% WPI related to the thoracic spine. Dr. Kominsky found a total of 28% WPI related to the compensable injury. Dr. Kominsky opined that no apportionment was necessary due to the fact that Mr. Horner had been working at a high functioning level prior to the compensable injury with no ongoing complaints of bilateral shoulder pain, left elbow stiffness, or axial spine pain.

Mr. Horner was evaluated by Prasadarao Mukkamala, M.D., on March 20, 2023. Using the *Guides*, Dr. Mukkamala found that Mr. Horner had a 2% WPI related to the right shoulder, 4% WPI related to the left shoulder, 0% WPI related to the left elbow, 5% WPI related to the cervical spine, 8% WPI related to the lumbar spine, and 0% WPI related to the thoracic spine. Dr. Mukkamala apportioned 1% right shoulder WPI, 2% left shoulder WPI, and 4% lumbar spine WPI to preexisting conditions, noting diagnostic imaging findings showed chronic, preexisting changes, and that Mr. Horner was involved in a motor vehicle accident in 2009 sustaining a back sprain for which he was treated with physical therapy. Dr. Mukkamala further noted that Mr. Horner received treatment for bilateral shoulder pain as far back as 2017. After apportioning, Dr. Mukkamala found that Mr. Horner had a combined total of 12% WPI related to the compensable injuries.

On October 23, 2023, the Board affirmed the claim administrator's orders, which granted Mr. Horner a 4% PPD award and a 10% PPD award, for a total of 14% PPD. The Board found that Mr. Horner failed to establish that he suffered more than 14% permanent

impairment related to his compensable diagnosis. Mr. Horner now appeals the Board's order.

Our standard of review is set forth in West Virginia Code § 23-5-12a(b) (2022), in part, as follows:

The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It shall reverse, vacate, or modify the 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) In violation of statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the Board of Review;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Duff v. Kanawha Cnty. Comm'n, 247 W. Va. 550, 555, 882 S.E.2d 916, 921 (Ct. App. 2022).

On appeal, Mr. Horner argues that the evidence establishes that he has significant residual impairments due to his compensable injury that did not exist prior to the injury. Mr. Horner further argues that his impairment should not have been apportioned, under this Court's holding in *Duff*, because his preexisting degenerative conditions did not affect his work or activities of daily living. Finally, Mr. Horner argues that his impairment should not have been apportioned because there was a gap in the treatment of his preexisting conditions and the compensable injury, wherein he was able to perform his job with no restrictions. We disagree.

Mr. Horner cites the cases of *Duff* and *Minor v. West Virginia Division of Motor Vehicles*, No. 17-0077, 2017 WL 6503113 (W. Va. Dec 19, 2017) (memorandum decision) in support of his arguments.

In *Minor*, the Supreme Court of Appeals of West Virginia found that, despite an x-ray prior to the claimant's injury revealing degenerative joint disease, apportionment was not appropriate when there was no evidence that the preexisting condition affected the claimant's ability to work or activities of daily living.

In *Duff*, this Court recognized that the Supreme Court has consistently held that radiographic evidence of degenerative changes alone is not sufficient to allow apportionment for preexisting injury. *Duff* at 558, 882 S.E.2d at 924. However, this Court also noted that apportionment has been found to be appropriate in cases where preexisting degenerative conditions were symptomatic prior to the compensable injury. See *Shepherd v. Cornerstone Interiors*, No. 21-0407, 2022 WL 4299586 (W. Va. Sept. 19, 2022) (memorandum decision) (upholding an apportionment of roughly half of the claimant's impairment to preexisting degenerative changes (spondyloarthropathy), as shown by imaging, where the claimant also had been undergoing pain management for those conditions prior to his compensable injury).

Here, the Board found that Mr. Horner failed to establish that he suffered any greater impairment than the total 14% PPD award that he has been granted. The Board found that due to a combination of Mr. Horner's history of a motor vehicle accident in 2009, pain symptoms, and prior imaging studies revealing preexisting degenerative conditions; apportionment was appropriate. The Board noted that the only evaluator of record that chose not to apportion was Dr. Kominsky, thus, it found Dr. Kominsky's report to be unreliable.

Upon review, we cannot conclude that the Board was clearly wrong in finding that Mr. Horner failed to establish that he suffered more than 14% WPI related to his compensable injury. Further, the Board was not clearly wrong in finding that the report of Dr. Kominsky was unreliable. As the Supreme Court of Appeals of West Virginia has set forth, "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). With this deferential standard of review in mind, we cannot conclude that the Board was clearly wrong in affirming the claim administrator's orders granting Mr. Horner a 10% PPD award and a 4% PPD award, for a total of 14% PPD.

We find no merit in Mr. Horner's argument that his prior symptoms and treatment should not have been considered in regard to apportionment due to the gap in documentation of symptoms and treatment prior to the compensable injury and the fact that his preexisting condition did not affect his work or activities of daily living. While a gap in documentation of symptom and treatment of a prior condition is a factor when considering apportionment, it would be one of many factors to be considered and would not override the other factors that were noted by the Board. Here, there are medical records, including radiographic evidence from prior to and after the injury, establishing that Mr. Horner had preexisting degenerative disc disease and a history of back, neck, and shoulder pain and treatment. Accordingly, we find that the Board was not clearly wrong in finding that apportionment was appropriate under the circumstances of the instant case. Further,

we find that the Board did not misapply this Court's holding in *Duff* to the facts of the instant case.

We find that the instant case can be distinguished from *Minor*. While the cases are similar in that there is a significant gap between the prior radiographic evidence and the injury in both, in the instant case, there is evidence that Mr. Horner has suffered back, shoulder, and neck pain for years, which differs from the circumstances of the *Minor* case. Therefore, we find that the Board was not clearly wrong in finding that apportionment was proper when considering both the radiographic evidence and history of pain.

Accordingly, we affirm the Board's October 23, 2023, order.

Affirmed.

ISSUED: March 25, 2024

CONCURRED IN BY:

Chief Judge Thomas E. Scarr
Judge Charles O. Lorensen
Judge Daniel W. Greear