

**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

**BRIAN COLLINS,  
Claimant Below, Petitioner**

v.) No. 23-ICA-519 (JCN: 2016005441)

**ALPHA NATURAL RESOURCES, INC.,  
Employer Below, Respondent**

**FILED  
March 25, 2024**

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

**MEMORANDUM DECISION**

Petitioner Brian Collins appeals the October 5, 2023, order of the Workers' Compensation Board of Review ("Board"). Respondent Alpha Natural Resources, Inc. ("Alpha") timely filed a response.<sup>1</sup> Mr. Collins did not file a reply. The issue on appeal is whether the Board erred in affirming the claim administrator's order, which denied Mr. Collins' request to reopen his claim for temporary total disability ("TTD") benefits and denied authorization for an AFO brace and referral to an orthopedist.

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.

On August 21, 2015, Mr. Collins injured his left ankle when he slipped and rolled off the edge of a step while working as a mine foreman for Alpha. Mr. Collins sought treatment at MedExpress. An MRI, dated September 3, 2015, revealed tendinopathy of the peroneus longus, with an early split tear in the inframalleolar portion; tendinopathy of the peroneus brevis; contusion of the medial malleolus, medial aspect of the talus, medial aspect of the navicular, and the sustentaculum talus; and chronic fibrosis of the Achilles tendon. The physician who completed the Employee's and Physician's Report of Occupational Injury form on August 21, 2015, diagnosed a sprain of unspecified ligament of left ankle as the result of an occupational injury.

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<sup>1</sup> Mr. Collins is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq. Alpha is represented by H. Dill Battle, III, Esq.

By decision of the Workers' Compensation Office of Judges ("OOJ") dated November 1, 2016, the claim was held compensable for sprain of unspecified ligament of left ankle. By separate orders dated December 21, 2016, the claim was held compensable for sprain of unspecified ligament of left ankle and unspecified disorder synovium and tendon of the left lower leg as compensable.

Mr. Collins underwent another MRI of the left ankle on May 1, 2017. The MRI, as compared to his previous MRI of September 3, 2015, showed marked improvement in appearance of the anterior talofibular ligament and calcaneofibular ligament with no evidence of a discrete tear; a partial thickness tear of the peroneus longus which was stable in location and size; mild sinus Tarsis syndrome fluid was noted; and medially located tendons at the level of the ankle and the respecting tendon sheath were also much improved.

On June 1, 2017, Rebecca Thaxton, M.D., authored a physician review report. Dr. Thaxton recommended that a request for left ankle peroneus longus tendon repair and a modified Brostrom procedure be authorized in the claim. However, she did not recommend that a request for platelet rich plasma ("PRP") injection be authorized in the claim.

On July 21, 2017, Mr. Collins underwent the following procedures performed by Carrie Gosselink, DPM: repair of the peroneus longus tendon of the left ankle; modified Brostrom left lateral ankle reconstruction of ligament; and PRP injection of the left ankle. Dr. Gosselink's post-operative diagnosis was peroneus longus tendon tear of the left ankle and left lateral ankle instability.

On February 28, 2018, the claim administrator issued an order closing the claim for TTD benefits. By separate order dated April 14, 2018, the claims administrator issued another order closing the claim for TTD benefits.

On March 27, 2018, Mr. Collins underwent an IME performed by Joseph Grady, II, M.D. Dr. Grady's assessment was status post repair of peroneus longus tendon tear and anchoring of the anterior talofibular and calcaneofibular ligaments. Dr. Grady found that Mr. Collins had reached maximum medical improvement ("MMI") and opined that further maintenance care was not needed. Using the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) ("the *Guides*"), Dr. Grady determined that there was 4% whole person impairment ("WPI") due to a range of motion loss regarding left ankle extension and a left ankle inversion related to the occupational injury.

On September 24, 2018, Mr. Collins underwent an IME performed by Robert Walker, M.D. Using the *Guides*, Dr. Walker assessed a combined total of 8% WPI related to loss of plantar flexion and hindfoot inversion related to the compensable injury.

An OoJ decision dated December 7, 2018, affirmed the claim administrator's orders dated February 28, 2018, and April 14, 2018, regarding the closure of the claim for TTD benefits. The OoJ found that Mr. Collins was not entitled to continued TTD benefits because he had returned to work without restrictions. The Board affirmed the OoJ decision on April 3, 2019. In *Collins v. Alpha Natural Resources, Inc.*, No. 19-0425, 2020 WL 5531250 (W. Va. Sept 15, 2020) (memorandum decision), the West Virginia Supreme Court of Appeals affirmed the Board's order.

Mr. Collins began treatment with Dr. JennaLouise Hollnagel, DPM, on November 18, 2019. Dr. Hollnagel assessed posterior tibial tendinitis; osteochondral defect; cavus deformity of foot; difficulty walking; pain in left foot; and history of ankle sprain. Dr. Hollnagel recommended an MRI and x-ray of Mr. Collins' left ankle for further evaluation. She also recommended a custom-molded orthotic to address Mr. Collins' severe cavus foot deformity. An x-ray of his left ankle revealed a small calcaneal spur and no evidence of fracture.

On December 3, 2019, Mr. Collins underwent an IME performed by David Soulsby, M.D. Dr. Soulsby diagnosed Mr. Collins with a severe sprain of the left ankle with a peroneal tendon tear. Dr. Soulsby assessed a 3% WPI for restriction of extension of left ankle, and 1% WPI for restricted hindfoot motion, for a combined total of 4% WPI. In reviewing Dr. Walker's report, Dr. Soulsby noted that the documented range of motion abnormalities in the left ankle were inconsistent when compared with the findings reported by Dr. Grady and the findings reported during the functional capacity evaluation. Dr. Soulsby opined that Mr. Collins had reached MMI, and that further treatment was not indicated. Dr. Soulsby stated that his evaluation findings were consistent with those reported by Dr. Grady, but that Dr. Walker's evaluation was not valid for the purpose of calculating impairment, and an award of 0% should have been recommended.

An MRI was performed on Mr. Collins' left ankle on January 2, 2020. The MRI revealed: internal fixation of the lateral fibula; a transplanted anterior talofibular ligament that was thickened but grossly intact; a split tear of the peroneus brevis; and tendinopathy of the peroneus longus.

On February 3, 2020, Mr. Collins presented for a follow-up of his left ankle with Dr. Hollnagel. He complained of a sharp, burning, dull pain in his left ankle. Dr. Hollnagel's assessment was posterior tibial tendinitis, osteochondral defect, cavus deformity of the foot, difficulty walking, pain in left foot, and history of ankle sprain. Dr. Hollnagel recommended that Mr. Collins stay in an ankle brace when working. She also recommended custom molded inserts for his severe cavus deformity. Dr. Hollnagel opined that Mr. Collins could return to work.

James Dauphin, M.D., performed a physician review on August 6, 2020. Dr. Dauphin recommended that posterior tibial tendinitis be added as a compensable diagnosis

to the claim. He further opined that none of the other diagnoses recommended by Dr. Hollnagel were injury diagnoses, therefore, they should not be added to the claim. Dr. Dauphin also assessed that there was no need for a new IME in this case, as Mr. Collins had been assessed with 4% WPI on multiple occasions.

By claim administrator order dated September 23, 2020, posterior tibial tendinitis was added as compensable under the claim.

Mr. Collins began treatment with Chinenye Ezike, DPM, on August 11, 2022. Dr. Ezike assessed peroneal tendonitis of the left leg, left foot pain, secondary osteoarthritis of the left ankle and foot, and bilateral foot congenital pes cavus. Dr. Ezike suspected a residual peroneal tendon rupture and talar osteochondral lesion versus ankle arthritis. Dr. Ezike recommended MRI studies of the left foot and ankle, and Mr. Collins was given a corticosteroid injection in the left foot. An ankle brace was applied to Mr. Collins' left foot, and he was instructed to wear the brace when walking.

On August 11, 2022, CR studies were performed on Mr. Collins' left foot and ankle. The CR of the left ankle revealed no evidence of an acute fracture. Multiple defects were noted in the distal fibula and talus likely from the prior surgical hardware placement. The CR of the left foot revealed no acute osseous findings.

Mr. Collins returned to Dr. Ezike on August 19, 2022, after suffering additional pain in his left foot the night before when he stepped with his left foot, heard a pop, and felt a pull. According to Dr. Ezike, Mr. Collins also complained of a hard knot on the top of his left foot that did not appear until after this incident. Dr. Ezike assessed ankle pain, peroneal tendonitis, secondary osteoarthritis of the left ankle and foot, and bilateral foot congenital pes cavus. Dr. Ezike recommended an x-ray to rule out any new fractures or dislocations. Mr. Collins' left lower extremity was placed in a surgical boot to utilize during times of gross instability in the left ankle. Dr. Ezike recommended that Mr. Collins be taken off work for two weeks.

On August 20, 2022, Mr. Collins completed a reopening application for TTD benefits. Mr. Collins alleged an aggravation and/or progression of his compensable injury. Dr. Ezike completed the physician's portion of the application on September 12, 2022. Dr. Ezike provided a diagnosis of left peroneal tendonitis and left ankle secondary osteoarthritis. Dr. Ezike noted that Mr. Collins had constant pain from the top of his left leg extending to his ankle joints and activity-induced pain along the lateral aspects of his left ankle. Although Dr. Ezike checked a box indicating that Mr. Collins had not sustained an aggravation or progression of his disability, she certified Mr. Collins as TTD from August 19, 2022, to September 20, 2022.

An MRI of Mr. Collins' left ankle was performed on September 12, 2022. The MRI was compared to Mr. Collins' prior MRI of January 2, 2020. The appearance of his left

ankle was similar to the prior study, with some mild tendinopathy of the posterior tibialis tendon.

An MRI of Mr. Collins' left foot performed on September 12, 2022, was unremarkable. There was no evidence of fracture, dislocation, tendinopathy, or a tendon tear. The appearance of the left ankle was found to be similar to the previous study, but possibly there was mild tendinopathy of the posterior tibialis tendon. On September 15, 2022, Mr. Collins was seen for a follow-up of his left foot MRI with Dr. Ezike. Dr. Ezike's assessment was left peroneal tendinitis, secondary osteoarthritis of the left ankle and foot, and bilateral foot congenital pes cavus. Mr. Collins was given a prescription for an AFO brace and a referral to Michael Gentile, DPM, for a second opinion and possible surgical intervention.

By order of the claim administrator dated October 3, 2022, the request to reopen the claim for TTD benefits was denied on the basis that the request failed to disclose a progression or aggravation in the compensable condition or some fact not previously considered which would entitle Mr. Collins to further benefits. Further, the claim administrator noted that a review of the medical records indicated that Mr. Collins had sustained an independent, intervening event in August that resulted in increased symptoms and the development of a knot on his foot. Finally, the claim administrator noted that Mr. Collins was not eligible for further benefits because he owns and operates his own logging company. Following a grievance process, on November 9, 2022, the claim administrator denied the request for an AFO brace and a referral to Dr. Gentile. Mr. Collins protested both orders to the Board.

On November 17, 2022, Mr. Collins submitted to a deposition. Mr. Collins testified that he has had instability in his left ankle after the surgery with Dr. Gosselink in 2017, as well as from the initial injury in 2015. He also testified that his ankle had given way multiple times. Further, Mr. Collins stated that there has been a soft tissue knot on the inside of his foot since he was initially injured in 2015. Mr. Collins also stated that on August 19, 2022, Dr. Ezike told him that a lace-up brace would not be suitable, and that an AFO brace was needed for his ankle. Further, he asserted that he left his job at the mine after his 2015 injury, and that he now owns a logging company but had been off of work due to dull pain in his ankle and swelling that continues up his calf.

On December 28, 2022, Mr. Collins was seen by Dr. Gentile. Dr. Gentile's assessment was ongoing left ankle pain and instability of the left lower extremity with multiple etiologies. Mr. Collins had a persistent peroneal brevis tear with a possible peroneal longus tear and peroneal overdrive. Dr. Gentile also assessed that there was evidence of tibial nerve or Baxter's nerve entrapment or neuritis. Mr. Collins also had a congenital idiopathic pes cavus, which Dr. Gentile opined was likely responsible for his prior surgery with Dr. Gosselink not being successful.

By decision dated October 5, 2023, the Board affirmed the claim administrator's October 3, 2022, and November 9, 2022, orders.<sup>2</sup> The Board found that the diagnoses associated with Dr. Ezike's reopening request—peroneal tendinitis and secondary osteoarthritis—have not been recognized as compensable conditions in this claim. Further, the Board noted that Dr. Ezike stated in the reopening application that Mr. Collins had not sustained an aggravation or progression of his compensable injury. The Board also affirmed the claim administrator's November 9, 2022, order which denied Dr. Ezike's request for an AFO brace and referral to an orthopedist. The Board found that none of the diagnoses associated with Dr. Ezike's requests had been recognized as compensable conditions of the claim, and that the request was not reasonably related to the compensable injury. It is from this order that Mr. Collins now appeals.

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. Collins argues that the Board was clearly wrong in finding that an AFO brace and a referral to an orthopedist were not medically related and reasonably required to treat the compensable injury. Mr. Collins also avers that the Board was clearly wrong in finding that he did not make a prima facie case that his condition had progressed or been aggravated to the point where he is eligible to reopen his claim for TTD benefits.

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<sup>2</sup> The Board also affirmed the claim administrator's January 18, 2023, order, which denied authorization for a left foot injection performed by Dr. Ezike. However, Mr. Collins did not appeal this portion of the Board's order.

Mr. Collins argues that it is clear from the record that his continuous falls and ankle instability caused by the compensable injury have escalated, and such evidence justifies an inference that there has been a progression or aggravation of the injury. We disagree.

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 order and denying Mr. Collins’ request to reopen his claim for TTD benefits, his request for an AFO brace, and a referral to an orthopedist.

In order to reopen a claim for TTD benefits, a claimant must show an aggravation or progression of a compensable condition or facts not previously considered. *See* W. Va. Code § 23-5-2 (2005) and § 23-5-3a (a) (2022). Our Supreme Court has stated that to reopen a claim, “the claimant must show a prima facie cause, which means nothing more than any evidence which would tend to justify, but not to compel the inference that there has been a progression or aggravation of the former injury.” Syl., *Harper v. Workmen’s Comp. Comm’r*, 160 W. Va. 364, 234 S.E.2d 779 (1977).

Here, the Board found that the diagnoses listed by Dr. Ezike in the reopening request, peroneal tendonitis, and secondary osteoarthritis, have not been recognized as compensable diagnoses in this claim. Additionally, the Board found that Dr. Ezike indicated in the reopening application that Mr. Collins had not sustained an aggravation or progression of his compensable injury. Further, the record indicates that Mr. Collins was deemed to have reached MMI with no need for further treatment by Dr. Grady on March 27, 2018, Dr. Walker on December 6, 2018, and Dr. Soulsby on December 3, 2019. Rather, Dr. Ezike’s notes from the August 19, 2022, examination, indicated that Mr. Collins felt a pop and a pull in his ankle the night before, and that a hard knot appeared on the top of his foot after the incident.<sup>3</sup> However, Mr. Collins disputes this information. Upon review, we find that the record supports the Board’s conclusion that there had been no aggravation or progression of the compensable condition to warrant reopening of the claim for TTD benefits. Accordingly, we find no clear error in the Board’s denial of Mr. Collins’ renewed claim for TTD benefits.

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<sup>3</sup> The Court notes that Mr. Collins disputes some of the factual information contained in Dr. Ezike’s August 19, 2022, treatment note. However, the Board found Dr. Ezike’s treatment note to be more credible. *See Martin v. Randolph Cnty. Bd. of Educ.*, 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995) (“We cannot overlook the role that credibility places in factual determinations, a matter reserved exclusively for the trier of fact. We must defer to the ALJ’s credibility determinations and inferences from the evidence. . . .”).

Turning to Mr. Collins’ assignment of error regarding the AFO brace and referral to an orthopedist, we find no error in the Board’s order denying these requests. West Virginia Code § 23-4-3 (a)(1) (2005) provides that the claim administrator must provide “[s]ums for healthcare services, rehabilitation services, durable medical and other goods and other supplies and medically related items as may be reasonably required.” The Board found that Dr. Ezike diagnosed Mr. Collins with left peroneal tendinitis, secondary osteoarthritis of the left ankle and foot, and bilateral foot congenital pes cavus. The record indicates that none of these diagnoses associated with Dr. Ezike’s request for an AFO brace and referral to an orthopedist have been recognized as compensable conditions in this claim, and that the request for treatment is not reasonably related to the compensable injury suffered in 2015. Upon review of the record, we cannot conclude that the Board clearly erred in denying the requests.

Accordingly, we affirm the Board’s October 5, 2023, order.

Affirmed.

**ISSUED:** March 25, 2024

**CONCURRED IN BY:**

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