

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Eddie R. Clark Jr.,
Claimant Below, Petitioner

v.) **No. 22-636** (BOR Appeal No. 2057630)
(JCN: 2020022075)

Redi Care, Inc.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner, Eddie R. Clark Jr., appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Redi Care, Inc., filed a timely response.¹ The issue on appeal is the claim administrator's denial of a permanent partial disability award, which was affirmed by the Workers' Compensation Office of Judges ("Office of Judges") on July 15, 2021, and then by the Board of Review on June 23, 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.

Mr. Clark, an emergency medical technician and driver, injured his lower back while lifting patients in the course of his employment on February 19, 2020, and the claim was held compensable for sprain of ligaments of the lumbar spine on April 2, 2020.² Mr. Clark began to have new symptoms on the left side that were different from the symptoms he experienced in his prior back injury in 2019, and he reported to his physician that he could not twist, turn, or bend due to severe pain. He also reported that he felt a constant pulsation in his mid-lower back and radiating pain down the left leg just above the knee. A June 26, 2020, MRI of the lumbosacral spine revealed a small broad-based disc herniation in the left central zones at the L5-S1 level indenting the ventral thecal sac and possibly contacting the left S1 nerve root.

¹ Petitioner, Eddie R. Clark Jr., is represented by James D. McQueen Jr., and Respondent, Redi Care, Inc., is represented by Charity K. Lawrence.

² Mr. Clark alleges that he sustained two compensable injuries while working for the employer. The first injury occurred on February 11, 2019, when he suffered a lumbar spine injury while lifting/loading a patient. On December 26, 2019, as a result of the February 11, 2019, injury, Mr. Clark was granted an 8% permanent partial disability award. He returned to work in mid-January 2020, and sustained a second, separate lumbar injury, in the course of his employment on February 19, 2020, which is the injury that is the subject of this appeal.

On August 31, 2020, Prasadarao Mukkamala, M.D., examined Mr. Clark and reviewed his treatment records. Dr. Mukkamala found that Mr. Clark had reached maximum medical improvement and opined that he required no further treatment. Dr. Mukkamala further opined that the treatment rendered in the claim thus far was mostly aimed at treating preexisting degenerative changes rather than the compensable lumbar sprain. Dr. Mukkamala placed Mr. Clark in Category II-C from Table 75 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) and assessed 7% impairment. Dr. Mukkamala also determined that Mr. Clark had a 9% impairment for lumbar range of motion loss. Combined, Dr. Mukkamala found a total of 15% lumbar spine impairment. Dr. Mukkamala then placed the claimant in Lumbar Category II from West Virginia Code of State Rules § 85-20-C (2006), which has an impairment range of 5% to 8%. Dr. Mukkamala therefore adjusted his impairment assessment to 8%. Dr. Mukkamala noted that Mr. Clark was previously granted an 8% permanent partial disability award for a different workers' compensation claim. Therefore, Dr. Mukkamala found that Mr. Clark was not entitled to a permanent partial disability award in this claim. On September 4, 2020, the claim administrator granted Mr. Clark no permanent partial disability award in this claim because the claimant remained fully compensated by his prior award. The claim administrator also closed the claim for permanent partial disability benefits.

Mr. Clark submitted preinjury records discussing his previous diagnosis of lumbar spondylosis and right L5 lumbar spondylitic arthropathy from his February 11, 2019, injury. In a record dated September 23, 2020, Mr. Clark reported to neurosurgeon Robert Marsh, M.D., that his lower back pain that started after lifting one patient progressively worsened after lifting a second patient. Dr. Marsh noted that Mr. Clark complained of radiating low back pain to the bilateral buttocks to both legs, with pain on the left side being greater than on the right side. Given his lack of improvement, combined with radiculopathy, Dr. Marsh recommended lumbar fusion at L5/S1. Dr. James Dauphin reviewed Dr. Marsh's request for surgery for the claim administrator on October 7, 2020, and he recommended the claim administrator deny the request because the West Virginia Code of State Rules § 85-20-21 (2006).³ It was Dr. Dauphin's opinion that the objective medical findings have not changed, and the injury in the claim is a lumbar strain. The claim administrator denied the request for the authorization of spinal surgery on October 14, 2020.

Mr. Clark protested the September 4, 2020, order awarding no permanent partial disability in the claim. On June 2, 2021, alternate motions for remand were filed requesting that the September 4, 2020, order be reversed as prematurely entered, and that Dr. Marsh's request for lumbar fusion surgery be approved. The employer argued that the Office of Judges lacked jurisdiction to order the claim administrator to authorize lumbar surgery, which was previously denied without a grievance or protest from Mr. Clark. Similarly, the employer argued that the Office of Judges lacked jurisdiction to designate the claim as a reopening of a prior claim, when the instant claim had been held compensable as a lumbar strain, without a protest from Mr. Clark.

³ West Virginia Code R. § 85-20-21 (2006) establishes the requirements and procedures to be followed by the West Virginia Workers' Compensation Commission, parties to claims pending before the Commission, employers, private carriers, and managed health care plan administrators and others involved in the delivery or proposed delivery of managed care to injured workers.

Additionally, the employer argued that the Office of Judges lacked jurisdiction to determine that a compensable aggravation of a lumbar disc lesion occurred when the issue was not in litigation.

In a final decision dated July 15, 2021, the Office of Judges affirmed the claim administrator's denial of permanent partial disability award, finding that Mr. Clark failed to submit any evidence directly disputing Dr. Mukkamala's permanent partial disability recommendation. The Office of Judges noted that the only issue on appeal was the issue of permanent partial disability impairment of the compensable injury of February 19, 2020, and Mr. Clark failed to protest the other issues he listed on appeal. Thus, the Office of Judges did not have jurisdiction to review a claim administrator's order denying treatment or disability benefits not protested to the Office of Judges. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its decision on June 23, 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).

On appeal, Mr. Clark argues that he suffered from disabling pain from the cumulative effect of two compensable injuries, and he requested reasonable medical treatment to address the compensable occurrences. He also argues that the decisions below placed "form over substance" resulting in premature findings of maximum medical improvement, and the barring of merited reasonable medical treatment related to the compensable lumbar spine condition. Mr. Clark further maintains that the Board of Review and Office of Judges erred in refusing to designate the second lumbar spine injury claim, with a date of injury of February 19, 2020, as a reopening of the initial 2019 claim. The employer disagrees with Mr. Clark's position and argues that the only issue in litigation is the amount of permanent partial disability impairment attributable to the claim.

After review, we agree with the reasoning and conclusions of the Office of Judges, as affirmed by the Board of Review. Mr. Clark argues that the Office of Judges and Board of Review acted without statutory or other legal authority in concluding that such issues as maximum medical improvement, medical treatment, and whether this claim should be deemed a reopening of a prior claim, are not within the scope of Mr. Clark's protest to the September 4, 2020, order granting no permanent partial disability award. However, West Virginia Code § 23-5-1(b)(1), provides that an action by the claim administrator:

is final unless the decision is protested within 60 days after receipt of such decision [and] unless a protest is filed within the 60 day period, the finding or action is final. This time limitation is a condition of the right to litigate the finding or action and hence jurisdictional.

Therefore, Mr. Clark's failure to protest the April 2, 2020, order finding that the instant claim constitutes a new compensable injury precluded the Office of Judges from granting his request to remand the instant claim with instructions to deem the claim a reopening of the prior claim. Similarly, Mr. Clark's failure to protest the October 5, 2020, order closing the claim for temporary total disability benefits based on Dr. Mukkamala's findings precluded the Office of Judges from considering that issue. As such, the only issue currently before this Court is the issue of the amount of permanent partial disability in Mr. Clark's claim.

The preponderance of the evidence indicates that Mr. Clark does not have whole person impairment as a result of his February 19, 2020, compensable injury. Dr. Mukkamala, who conducted an independent medical evaluation of Mr. Clark on August 31, 2020, found him to be at maximum medical improvement with no additional permanent partial disability. Although Mr. Clark protested the claim administrator's order dated September 4, 2020, awarding 0% permanent partial disability benefits, the Office of Judges found that he did not submit any evidence to dispute Dr. Mukkamala's recommendations. The Office of Judges appropriately considered the evidence of record and found that a clear preponderance of the record supports the claim administrator's September 4, 2020, order. Because the Board of Review did not err, the June 23, 2022, order is affirmed.

Affirmed.

ISSUED: April 30, 2024

CONCURRED IN BY:

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