

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**DIVERSIFIED GAS & OIL, PLC,
Employer Below, Petitioner**

v.) No. 23-ICA-549 (JCN: 20210008251)

**JAMES M. KODAK,
Claimant Below, Respondent**

**FILED
April 22, 2024**

ASHLEY N. DEEM, DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Diversified Gas & Oil, PLC (“Diversified”) appeals the October 31, 2023, order of the Workers’ Compensation Board of Review (“Board”). Respondent James Kodak timely filed a response.¹ Diversified did not file a reply. The issue on appeal is whether the Board erred in reversing the claim administrator’s order and finding that Mr. Kodak was entitled to temporary total disability (“TTD”) benefits through January 5, 2023.

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 October 23, 2020, Mr. Kodak was working as a measuring technician for Diversified, when he was involved in a motor vehicle accident. The truck that Mr. Kodak was driving was struck by an oncoming truck on the front passenger side. At the moment of impact, Mr. Kodak was slammed forward and backward, and his head slammed into the headrest. He experienced immediate pain in his neck, low back, right shoulder, and head. Mr. Kodak was transported by ambulance to the emergency room at Beckley ARH Hospital.

Mr. Kodak was seen by David L. Stuart, M.D., on the date of the accident. Dr. Stuart’s diagnosis was abdominal pain, cervical muscle strain, strain of the mid-back, superficial bruising, shoulder pain, and closed head injury with concussion. By order dated November 5, 2020, the claim administrator held the claim compensable for cerebral concussion, lower back pain, abdominal pain, cervical sprain, right shoulder sprain, right elbow pain, and left ankle pain.

¹ Diversified is represented by Daniel G. Murdock, Esq. Mr. Kodak is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq.

Paul Bachwitt, M.D., performed an independent medical evaluation (“IME”) of Mr. Kodak on March 1, 2021. Dr. Bachwitt’s diagnosis was a right shoulder rotator cuff tear, for which he recommended surgical repair. Dr. Bachwitt noted that an MRI dated February 17, 2021, showed, among other things, a tear of the distal supraspinatus with retraction, distal subscapularis tendinopathy with distal tear involving the bicipital pulley region, and medial dislocation of the proximal biceps tendon. Dr. Bachwitt stated that all recommended treatment was related to the occupational injury of October 23, 2020. He opined that Mr. Kodak had not reached maximum medical improvement (“MMI”) and recommended a right shoulder rotator cuff repair. Dr. Bachwitt also recommended limitations on lifting more than ten pounds, and no overhead activities.

On March 24, 2021, Frederick B. Morgan, D.O., performed a diagnostic arthroscopy of the right shoulder with arthroscopic rotator cuff repair and subacromial decompression and insertion of On-Q pain catheter. The pre- and post-surgery diagnosis was rotator cuff tear, right shoulder.

Mr. Kodak returned to Dr. Morgan on June 21, 2021. He stated that he had continual pain in his right shoulder, and that the surgery did not provide any relief. Dr. Morgan’s diagnosis was rotator cuff tear, complete, right shoulder, as well as pain in the right shoulder. Dr. Morgan ordered an MRI arthrogram of the right shoulder. On July 14, 2021, Mr. Kodak underwent an MRI of the right shoulder. Among the findings in the MRI were a tear of the distal supraspinatus with retraction, distal infraspinatus tendinopathy without definite tear, and post-operative changes.

On August 3, 2021, Mr. Kodak returned to Dr. Bachwitt for an additional IME. Mr. Kodak complained of right shoulder pain, limited use of his right arm, and numbness in the right fingers. Dr. Bachwitt’s diagnosis was recurrent right rotator cuff tear with retraction. Dr. Bachwitt recommended an arthroscopic right shoulder rotator cuff repair and opined that Mr. Kodak had not reached MMI. Dr. Bachwitt again recommended that Mr. Kodak be given activity limitations of lifting no more than ten pounds, and no overhead lifting.

On September 1, 2021, Mr. Kodak underwent a diagnostic arthroscopy of the right shoulder with debridement of massive rotator cuff tear and insertion of the On-Q catheter, performed by Dr. Morgan. The postoperative diagnosis was a massive irreparable rotator cuff tear in the right shoulder.

On October 21, 2021, Mr. Kodak visited Dr. Morgan for a post-operative assessment. Mr. Kodak complained of significant pain in the right shoulder which inhibited any activity in the right arm. Dr. Morgan noted that Mr. Kodak had noticed no benefit from the recent debridement surgery and diagnosed a complete rotator cuff tear in the right shoulder. Further, he recommended a referral for a reverse shoulder arthroplasty.

By order dated October 28, 2021, the claim administrator granted authorization for a consultation with Benjamin R. Graves, M.D. Mr. Kodak began treatment with Dr. Graves on January 11, 2022. Dr. Graves' diagnosis was a massive rotator cuff tear. He noted that Mr. Kodak was in severe pain at the time of the visit, and that he had performed extensive physical therapy without improvement. Dr. Graves noted that Mr. Kodak was temporarily and totally disabled. Dr. Graves recommended a reverse total shoulder arthroplasty and ordered that Mr. Kodak should remain out of work until released to return following the surgery.

Dr. Graves performed the surgery on February 14, 2022. The preoperative diagnosis was right shoulder rotator cuff tear arthropathy. Dr. Graves performed a right shoulder reverse total shoulder arthroplasty and right shoulder open long head of biceps tenotomy. Dr. Graves' postoperative diagnosis was right shoulder rotator cuff tear arthropathy. On March 31, 2022, Mr. Kodak visited Dr. Graves for a post-operative exam. He reported that he had no numbness or tingling, and that he was doing well. Dr. Graves recommended that Mr. Kodak stop using a sling and advance his activity levels as tolerated.

Prasadarao Mukkamala, M.D., performed an IME on April 18, 2022. Mr. Kodak reported limitation of motion along with pain in the right shoulder. Mr. Kodak also stated that his right shoulder pain limited his activities of daily living. Dr. Mukkamala's diagnosis was rotator cuff sprain/strain right shoulder. He opined that all other conditions including low back pain, cerebral concussion, abdominal pain, cervical sprain, right elbow pain, and left ankle pain had resolved. Dr. Mukkamala opined that Mr. Kodak did not require any further treatment, as he had received all adequate and appropriate treatment. Dr. Mukkamala concluded that Mr. Kodak had reached MMI.

By order dated May 16, 2022, the claim administrator suspended Mr. Kodak's TTD benefits based upon Dr. Mukkamala's finding of MMI.

On July 7, 2022, Mr. Kodak returned to Dr. Graves. Dr. Graves stated that Mr. Kodak was doing well, and he recommended that he advance activity as tolerated. Mr. Kodak complained of continued pain and weakness, and limited range of motion. Dr. Graves ordered Mr. Kodak to remain out of work until released to return.

By order dated July 16, 2022, the claim administrator closed Mr. Kodak's claim for TTD benefits based on Dr. Mukkamala's report dated April 19, 2022. Mr. Kodak protested this order to the Board.

Dr. Graves completed a diagnosis update form on August 1, 2022. He requested that the conditions of right shoulder rotator cuff tear arthropathy, s/p failed arthroscopic rotator cuff repair times two, and traumatic rotator cuff tear be added to the claim as compensable conditions. On October 12, 2022, the claim administrator added right shoulder rotator cuff

tear arthropathy, status post failed arthroscopic rotator cuff repair times two, and traumatic rotator cuff tear as compensable conditions to the claim.

On November 28, 2022, Mr. Kodak visited Dominador Lao, M.D., his primary care physician. Dr. Lao opined that Mr. Kodak was restricted from simple grasping, pushing, and pulling, and doing fine manipulations with his upper extremities. Dr. Lao opined that Mr. Kodak was limited to sedentary work and that he had reached MMI but was unable to work.

Mr. Kodak visited Dr. Graves on January 5, 2023. Mr. Kodak complained of continued pain, weakness, and stiffness in his right shoulder. Dr. Graves noted that, after having three surgeries, it was not unrealistic to expect at least six months to a year before Mr. Kodak was happy with his shoulder. Dr. Graves opined that Mr. Kodak had permanent partial restrictions on lifting, pushing, or pulling greater than twenty pounds. Dr. Graves testified that Mr. Kodak reached MMI on this date.

On May 22, 2023, Dr. Graves testified in a deposition that he found Mr. Kodak to be at MMI on January 5, 2023. Further, he stated that due to the nature of Mr. Kodak's injury he likely wouldn't reach MMI until six months to a year after the surgery, and that January 2023 was a reasonable timeframe. Dr. Graves testified that at the time of the March 31, 2022, visit, Mr. Kodak was only six weeks out from his replacement, and that he checked to see that Mr. Kodak didn't dislocate his shoulder, and that there was no infection. He stated that at the time of Mr. Kodak's May 12, 2022, visit, he had less pain than before, but he still had weakness and decreased range of motion. Dr. Graves testified that at the time of Mr. Kodak's appointment on July 7, 2022, he was continuing to make progress, but was still in pain. Further, Dr. Graves testified that because of Mr. Kodak's permanent restrictions due to the February 14, 2022, surgery, he would not expect Mr. Kodak to ever return to his pre-injury employment. Dr. Graves stated that he performs around eighty reverse arthroplasty surgeries annually.

By order dated October 31, 2023, the Board reversed the claim administrator's order closing the claim for TTD benefits. The Board found that Dr. Graves' opinion regarding when Mr. Kodak reached MMI was the most reliable, and that his familiarity with Mr. Kodak's condition made his opinion more persuasive than Dr. Mukkamala's and Dr. Lao's opinions. The Board held that Mr. Kodak was entitled to TTD benefits from the date last paid through January 5, 2023.

Our standard of review in appeals from the Board 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, Diversified raises three assignments of error. First, Diversified argues that the Board's finding that the correct date for the termination of Mr. Kodak's TTD benefits was January 5, 2023, is clearly wrong in view of the evidence. Diversified also argues that the Board erred in awarding additional TTD benefits during a time when Mr. Kodak failed to establish temporary disability by substantial medical evidence. Finally, Diversified argues that the Board's basis for accepting Dr. Graves' opinion over the opinions of Dr. Lao and Dr. Mukkamala was impermissibly arbitrary. Upon review, we disagree.

Pursuant to West Virginia Code § 23-4-7a (2005), entitlement to TTD benefits terminates when the claimant has reached MMI, has been released to return to work, or has returned to work, whichever occurs first. The record establishes that Dr. Graves performed Mr. Kodak's February 14, 2022, surgery, and that he saw Mr. Kodak for several follow up visits. In contrast, the medical evidence suggests that Dr. Mukkamala only examined Mr. Kodak once, and that Dr. Lao is a primary care physician who has less expertise regarding this post-surgery recovery. In his report from January 5, 2023, Dr. Graves opined that it was "not unrealistic to expect at least 6 months to [a] year before he was happy with his shoulder." In his testimony about this visit, Dr. Graves explained that for such a long course of treatment that included significant surgeries, it was reasonable to believe that Mr. Kodak would have a long recovery period and that he would not have anticipated that MMI would be achieved any sooner than six months, and that, looking at the trajectory here, a January 2023 date was reasonable and about average. Further, he testified that it was at this visit that he believed Mr. Kodak had reached MMI. Diversified is incorrect in its allegation that Dr. Graves testified that Mr. Kodak should have reached MMI six months from the date of the August 2022 surgery.

As our Supreme Court of Appeals 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). The Board found that Dr. Graves' opinion was more persuasive, specifically citing his familiarity with Mr. Kodak's condition. The substantial evidence in the record supports the Board's reliance on Dr. Graves' opinion, and its conclusion that Mr. Kodak's benefits should have continued until January 5, 2022.

Moreover, the evidence is clear that Mr. Kodak was temporarily and totally disabled as a result of his work-related injury in the period between April 19, 2022, and January 5, 2023. Following the 2020 injury, Mr. Kodak underwent three surgeries for his compensable right shoulder injury, the last of which was a reverse shoulder arthroplasty. The medical evidence establishes that between April 19, 2022, and January 5, 2023, Mr. Kodak's range of motion continued to improve, and his pain levels continued to decrease following his last surgery. Further, Dr. Mukkamala deemed Mr. Kodak to be at MMI only two months after his reverse shoulder arthroplasty, despite Dr. Graves' opinion that his recovery would take six months or longer. Given this evidence, we cannot conclude that the Board's decision that Mr. Kodak was entitled to TTD benefits in the period between April 19, 2022, and January 5, 2023, was clearly wrong.

Accordingly, we affirm the Board's October 31, 2023, order.

Affirmed.

ISSUED: April 22, 2024

CONCURRED IN BY:

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