

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**ACNR RESOURCES, INC.,
Employer Below, Petitioner**

v.) No. 23-ICA-552 (JCN: 2023003773)

**RYAN HILL,
Claimant Below, Respondent**

**FILED
April 22, 2024**

EDYTHE NASH GAISER, CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner ACNR Resources, Inc.,¹ (“ACNR”) appeals the November 13, 2023, order of the Workers’ Compensation Board of Review (“Board”). Respondent Ryan Hill filed a response.² ACNR did not reply. The issue on appeal is whether the Board erred in reversing the claim administrator’s order, which denied the addition of occipital neuritis to the claim as a compensable diagnosis.³

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.

¹ For reasons not readily apparent in the appendix record, the petitioner’s counsel has substituted “Marshall County Coal Resources, Inc.” for the employer that was identified below as “ACNR Resources, Inc.” Consistent with the action of the Supreme Court of Appeals of West Virginia in *Delbert v. Murray American Energy, Inc.*, 247 W. Va. 367, 369 n.1, 880 S.E.2d 89, 91 n.1 (2022), we use the name of the employer as designated in the order on appeal: ACNR Resources, Inc.

² ACNR is represented by Aimee M. Stern, Esq. Mr. Hill is represented by J. Thomas Greene, Jr., Esq., and T. Colin Greene, Esq.

³ The Board’s order also affirmed the claim administrator order’s insofar as it denied the addition of cervicogenic headaches (as they were encompassed by the compensable diagnosis of postconcussional syndrome) and whiplash injury (as it is encompassed by the compensable diagnosed of a cervical strain) to the claim as compensable diagnoses. That portion of the Board’s order is not being appealed in the instant case.

On July 25, 2022, while working for ACNR as a coal miner, Mr. Hill hit his head on an overhead beam and sustained injuries to his head, neck, shoulder, and back. On the same day, Mr. Hill was seen at the Wheeling Hospital Emergency Department by Jennifer Sallinger, APRN. Ms. Sallinger's assessment was post-concussive syndrome.

Mr. Hill was seen by Charles Milton, D.O., on August 5, 2022, September 7, 2022, and November 21, 2022. Dr. Milton noted Mr. Hill's history of head injuries. Dr. Milton diagnosed Mr. Hill with a concussion with a cervical component and cervical strain. Dr. Milton recommended physical therapy for the cervical area and an MRI of the cervical spine. Mr. Hill underwent a cervical MRI on December 10, 2022, revealing moderate right neural foraminal narrowing at C4-C5 and mild right neural foraminal narrowing at C5-C6.

On December 22, 2022, Mr. Hill was seen by Michael Ebbert, D.O., a neurologist. Dr. Ebbert assessed a whiplash injury to the neck, a concussion without loss of consciousness, neck pain, cervicogenic headache, cervical paraspinal muscle spasm, occipital neuritis, sleep disturbance, and convergence insufficiency. Dr. Ebbert prescribed medication and recommended a referral to physical therapy for a vestibular assessment and rehabilitation, and for the lower neck and upper back. Mr. Hill returned to Dr. Ebbert on January 19, 2023, and reported that his headaches were essentially gone, he experienced only mild photophobia, and his neck was feeling better. Mr. Hill further reported that he was experiencing tinnitus and mild blurring of vision.

The Board issued an order dated March 1, 2023, holding the claim compensable for post-concussive syndrome. The claim administrator acknowledged this order on March 9, 2023.⁴

On March 30, 2023, Mr. Hill followed up with Dr. Ebbert, who noted that Mr. Hill was doing better with about 50% improvement after the last round of steroid injections. Mr. Hill reported that he continued to experience tinnitus and mild photophobia, and he had headaches about once a week. Mr. Hill denied any major pain in his neck. Dr. Ebbert completed a Diagnosis Update form dated March 30, 2023, requesting that the diagnoses of concussion without loss of consciousness, whiplash injury to neck, cervicogenic headache, and occipital neuritis be added to the claim as compensable diagnoses. On the same day, Dr. Ebbert requested additional physical therapy, return visits, medications, and trigger point/nerve block injections.

Prasadarao Mukkamala, M.D., performed an independent medical evaluation of Mr. Hill on July 11, 2023. Dr. Mukkamala opined that Mr. Hill had reached his maximum degree of medical improvement. Dr. Mukkamala disagreed with the diagnoses of whiplash

⁴ It is unclear from the record when strain of muscle, fascia and tendon at the neck level was added to the claim, however, the Board's November 13, 2023, order indicates that this is a compensable diagnosis.

injury to the neck, cervicogenic headaches, and occipital neuritis. With regard to the whiplash injury to the neck, Dr. Mukkamala opined that the diagnosis of cervical strain was more appropriate for the claimant's condition. Dr. Mukkamala noted that Mr. Hill had a history of preexisting headaches and, thus, he disagreed with the diagnosis of cervicogenic headaches. Further, Dr. Mukkamala opined that there was no clinical evidence of occipital neuritis and characterized that as a speculative diagnosis.

On November 13, 2023, the Board reversed the claim administrator's order, which denied the addition of occipital neuritis to the claim as a compensable diagnosis. The Board found that the preponderance of the credible medical evidence establishes that the diagnosis of occipital neuritis is causally related to the compensable injury. ACNR 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, ACNR argues that the medical evidence establishes that occipital neuritis is a symptom of Mr. Hill's compensable cervical injury rather than a separate compensable diagnosis. ACNR further argues that Dr. Ebbert failed to explain the basis of his occipital neuritis diagnosis and his treatment recommendations for this condition were the same as for his diagnoses of whiplash, cervicogenic headaches, and cervical muscle spasm, thus, indicating all were symptoms of the cervical injury. We disagree.

Here, the Board determined that the preponderance of the credible medical evidence establishes that the diagnosis of occipital neuritis is causally related to the compensable

injury. The Board further found that the opinion of Dr. Ebbert, a neurologist who saw Mr. Hill multiple times, was more credible and persuasive than that of Dr. Mukkamala, who evaluated Mr. Hill one time. The Board noted that Dr. Ebbert had been treating Mr. Hill since December 2022, and found that his records provide sufficient details regarding Mr. Hill's diagnoses and treatment. Ultimately, the Board ordered that occipital neuritis be added to the claim as a compensable condition.

Upon review, we conclude that the Board was not clearly wrong in finding that occipital neuritis was causally related to the compensable injury based on Dr. Ebbert's opinion. 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 reversing the claim administrator's order and adding occipital neuritis to the claim as a compensable diagnosis. Further, we note that, despite arguing that there is no medical evidence establishing that occipital neuritis is a separate compensable diagnosis, ACNR has offered no medical evidence indicating that it is not a separate compensable diagnosis.

Accordingly, we affirm the Board's November 13, 2023, order.

Affirmed.

ISSUED: April 22, 2024

CONCURRED IN BY:

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