

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FILED

October 1, 2024

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

**RUSSELL BARNETT,
Claimant Below, Petitioner**

v.) No. 24-ICA-178 (JCN: 2021018364)

**SHAFT DRILLERS INTERNATIONAL, LLC,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Russell Barnett appeals the March 25, 2024, order of the Workers' Compensation Board of Review ("Board"). Respondent Shaft Drillers International, Inc. ("Shaft Drillers") timely filed a response.¹ Mr. Barnett did not file a reply. The issue on appeal is whether the Board erred in affirming the claim administrator's order, which denied the request to add superior labrum from anterior to posterior ("SLAP") tear of the right shoulder as a compensable condition.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2024). 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.

The claim administrator issued an order dated March 11, 2021, which accepted the claim at issue for right wrist displaced fracture. When Mr. Barnett was seen by George Bal, M.D., on August 9, 2021, he reported that he had a work-related injury on March 2, 2021, when he fell off a truck, fractured his right wrist, and subsequently underwent an open reduction and internal fixation. Mr. Barnett also stated that as he became able to use his upper right extremity more, he noticed pain around the anterior aspect of his shoulder and upper arm. Dr. Bal's assessment was right shoulder pain with possible rotator cuff injury, and he ordered an MRI of Mr. Barnett's right shoulder.

Mr. Barnett followed up with Dr. Bal on September 13, 2021. Mr. Barnett reported that he did not get the MRI of his right shoulder, as his worker's compensation claim was denied for his shoulder. Dr. Bal's assessment was right shoulder pain with possible rotator cuff injury and right shoulder stiffness.

¹ Mr. Barnett is represented by J. Thomas Greene, Jr., Esq., and T. Colin Greene, Esq. Shaft Drillers is represented by Maureen Kowalski, Esq.

On September 20, 2021, Joseph Grady, M.D., performed an independent medical evaluation (“IME”) of Mr. Barnett. Dr. Grady’s assessment was status post comminuted and displaced intraarticular right distal radius metaphysis fracture of right wrist and status post multiple tendon transfers of right hand with some residual contractures. Dr. Grady concluded that a shoulder MRI was medically reasonable for investigation of the reported shoulder symptoms, and that Mr. Barnett had not reached maximum medical improvement (“MMI”). Further, Dr. Grady opined that based on the reported mechanism of injury from the events of March 2, 2021, Mr. Barnett could have potentially sustained a right shoulder injury on that occasion, and that the MRI would be the next logical step for evaluation.

On November 4, 2021, Mr. Barnett gave deposition testimony regarding his March 2, 2021, injury, and subsequent treatment. Mr. Barnett testified that he was injured when he fell off the back of a truck and landed on his right side with his arm outstretched, and that he was treated at the WVU Hospital Emergency room on the same date. Mr. Barnett stated that he underwent surgery for his right wrist, performed by Dr. Taras, who referred him to Dr. Bal for his shoulder issues. Mr. Barnett explained that he was having shooting pains through his arm, and that he couldn’t lift it sideways. Mr. Barnett also stated that he was in physical therapy for his right shoulder. He testified that prior to the injury on March 2, 2021, he was not having right shoulder problems and could perform all of his job duties.

On December 20, 2021, Mr. Barnett followed-up with Dr. Bal. He reported that the pain in his shoulder was significantly interfering with his daily activities. Dr. Bal noted that he reviewed the MRI from October, which showed a SLAP tear in the right shoulder. Dr. Bal recommended a right shoulder arthroscopy with debridement and biceps tenodesis.

On January 6, 2022, Mr. Barnett was seen again by Dr. Bal, who assessed right shoulder superior labral tear. On January 12, 2022, Dr. Bal performed a right shoulder arthroscopy with debridement and right biceps tenodesis. The preoperative diagnosis was right shoulder superior labral tear, but the postoperative diagnosis was right shoulder biceps tenosynovitis. On February 28, 2022, Dr. Bal reported that Mr. Barnett was six weeks status post right shoulder arthroscopy with biceps tenodesis, and he recommended physical therapy.

On October 17, 2022, the Board issued an order which affirmed the claim administrator’s orders of September 27, 2021, which denied the request for right shoulder physical therapy, and April 27, 2022, which denied the request for right shoulder arthroscopy with debridement and biceps surgery. The Board modified the claim administrator’s April 27, 2022, order to reflect that the diagnoses requested by Dr. Bal were denied, but that Mr. Barnett was not precluded from submitting a diagnosis update form for a right shoulder diagnosis other than right shoulder pain and stiffness.

Syam Stoll, M.D., performed a second IME of Mr. Barnett on March 1, 2023. Dr. Stoll assessed shoulder pain of unspecified chronicity, unspecified laterally; bicipital

tendinitis in the right shoulder; and adhesive capsulitis of the right shoulder. Dr. Stoll opined that based on the medical records and his examination of Mr. Barnett, he did not believe that Mr. Barnett sustained an acute right shoulder SLAP tear in the course of his employment on March 2, 2021. Dr. Stoll found that Mr. Barnett was at MMI for the conditions of shoulder pain unspecified chronicity, unspecified laterality, bicipital tendinitis, right shoulder, and adhesive capsulitis of right shoulder. Dr. Stoll concluded that Mr. Barnett had extensive preexisting degenerative joint disease and prior injury, and he noted Dr. Bal's surgery on the right shoulder, all of which contributed to his current range of motion loss. Using the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), Dr. Stoll determined that Mr. Barnett had a 10% whole person impairment rating for the right shoulder injury in this claim, 5% of which he apportioned to preexisting degenerative joint disease, prior injuries, and surgery in the right shoulder. Thus, Dr. Stoll concluded that Mr. Barnett had 5% WPI for the compensable injury.

On June 23, 2023, the claim administrator denied Mr. Barnett's application for right shoulder SLAP tear to be added as a compensable condition in the claim. The claim administrator's order stated that based on Dr. Stoll's IME report, which found Mr. Barnett to be at MMI, he did not sustain the SLAP tear in the course and scope of employment.

On August 17, 2023, Mr. Barnett gave a second deposition regarding his request to add a right shoulder SLAP tear as a compensable condition in the claim. Mr. Barnett testified that he continued to have pain in his shoulder area throughout physical therapy, and that he made an appointment with Dr. Bal after he started getting a frozen shoulder. When asked, Mr. Barnett could not recall details regarding a September 10, 1989, right shoulder injury. Mr. Barnett stated that he did have a bicep tear injury in 2010, but he denied having any problems with his right shoulder when he started work on March 2, 2021, the date of the compensable injury.

By order dated March 25, 2024, the Board affirmed the claim administrator's June 23, 2023, order, which denied the request to add SLAP tear of the right shoulder as a compensable condition. The Board noted that the record did not include a copy of a request to add SLAP tear as a compensable condition. Further, the Board stated that the medical evidence establishes that Dr. Bal suspected a SLAP tear as indicated in his preoperative diagnoses of January 12, 2023, but that when Dr. Bal performed surgery a SLAP tear was not confirmed. The Board found that there was no evidence of record after the operative report opining that Mr. Barnett sustained a SLAP tear, and that there was no evidence causally relating a SLAP tear to the work injury. Instead, the Board determined that the only medical opinion on the record was Dr. Stoll's, finding that Mr. Barnett did not sustain an acute right shoulder SLAP tear on March 2, 2021. It is from this order that Mr. Barnett 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.

Syl. Pt. 2, *Duff v. Kanawha Cnty. Comm'n*, No. 23-43, 2024 WL 1715166, __ W. Va. __, __ S.E.2d __ (2024).

On appeal, Mr. Barnett argues that his mechanism of injury, the chronology of his symptoms, and the manner in which he came under Dr. Bal's care all demonstrate the causal link between Mr. Barnett's right shoulder symptoms and the compensable injury of March 2, 2021. Further, Mr. Barnett argues that the Board was incorrect in finding that Dr. Bal's Diagnosis Update form had not been submitted to the evidentiary record. Upon review, we disagree with Mr. Barnett's arguments.

Three elements must coexist in worker's compensation cases to establish compensability: "(1) a personal injury, (2) received in the course of employment, and (3) resulting from that employment." Syl. Pt. 1, *Barnett v. State Workmen's Comp. Comm'r*, 153 W. Va. 796, 172 S.E.2d 698 (1970).

As set forth by the Supreme Court of Appeals of West Virginia, "[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, which denied the request to add SLAP tear of the right shoulder as a compensable condition.

The Board found that although Dr. Bal suspected a SLAP tear prior to Mr. Barnett's surgery, a SLAP tear was not confirmed during the surgery. Further, the only medical opinion in the record from after the surgery is Dr. Stoll's, who opined that Mr. Barnett did not sustain an acute right shoulder SLAP tear on the date of the compensable injury in this case. Moreover, as noted by the Board, there is no medical evidence in the record causally relating a SLAP tear to the March 2, 2021, injury. Further, as noted by the Board, the November 14, 2022, Diagnosis Update form was not part of the evidentiary record before the Board, and thus cannot be considered by this Court. For the foregoing reasons, we conclude that the Board was not clearly wrong in affirming the claim administrator's order, which denied the request to add SLAP tear of the right shoulder as a compensable condition in this claim.

Accordingly, we affirm the Board's March 25, 2024, order.

Affirmed.

ISSUED: October 1, 2024

CONCURRED IN BY:

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