

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**JIMMY R. BLANKENSHIP,
Claimant Below, Petitioner**

v.) No. 24-ICA-202

(JCN: 2021025714)

**MULLICAN FLOORING, LP,
Employer Below, Respondent**

**FILED
October 28, 2024**

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

MEMORANDUM DECISION

Petitioner Jimmy R. Blankenship appeals the April 16, 2024, order of the Workers' Compensation Board of Review ("Board"). Respondent Mullican Flooring, LP ("Mullican") timely filed a response.¹ Mr. Blankenship did not reply. The issue on appeal is whether the Board erred in affirming the claim administrator's order, which granted Mr. Blankenship a 5% permanent partial disability ("PPD") award.

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.

Prior to the compensable injury in this case, Greenbrier Valley Medical Center records dated May 12, 2016, and June 12, 2016, indicate that Mr. Blankenship reported an injury to his right shoulder and neck. Mr. Blankenship's CT scan performed in 2016 revealed advanced degenerative changes with spinal stenosis and small central disc herniations at C3-C4 and C4-C5, a small right paramedian disc herniation at C5-C6, and significant osteophytic encroachment into the spinal canal and the right lateral recess at C6-C7. A May 28, 2020, left shoulder MRI revealed a full-thickness tear of the rotator cuff, impingement syndrome, and minimal joint effusion.

On August 10, 2020, Mr. Blankenship underwent a left shoulder arthroscopy, repair of an acute rotator cuff tear, subacromial decompression, distal clavicle excision, and debridement of the hypertrophic synovium.

¹ Mr. Blankenship is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq. Mullican is represented by Steven K. Wellman, Esq., and James W. Heslep, Esq.

Turning to the compensable injury in this case, Mr. Blankenship, a forklift operator at Mullican, signed an Employees' and Physicians' Report of Occupational Injury on June 23, 2021, which stated that he hurt his right side when he fell out of a forklift while at work on the same date. The physician's portion was completed at MedExpress on June 23, 2021, and cited an occupational injury to Mr. Blankenship's head, right shoulder, right knee, and right hand. In a second Report of Occupational injury, completed at Greenbrier Valley Medical Center on June 24, 2021, a physician listed injuries to Mr. Blankenship's right shoulder, and abrasions to the face, knee, and head. A CT scan of Mr. Blankenship's head on the same date was negative for any acute abnormalities.

By order dated July 1, 2021, the claim administrator held the claim compensable for a sprain of the right shoulder joint and contusions of the right knee, head, and right hand. By order dated October 15, 2021, the claim administrator approved the additional diagnoses of right wrist fracture and right rotator cuff tear. The diagnosis of a cervical sprain/strain was withheld pending a neurological consultation.

Thomas Holbrook, M.D., completed a Diagnosis Update form on August 21, 2021, which listed Mr. Blankenship's primary diagnosis as a cervical sprain. The secondary diagnoses were listed as fracture of the wrist, contusion of the head, shoulder sprain, and rotator cuff tear.

On November 16, 2021, Prasadarao Mukkamala, M.D., performed an independent medical evaluation ("IME") of Mr. Blankenship. Dr. Mukkamala noted the compensable conditions were sprain to the right shoulder joint, contusion of the right knee, contusion of the right hand, fracture of the right wrist, and a right rotator cuff tear. Dr. Mukkamala opined that Mr. Blankenship did not have an injury to his cervical spine, and that he had evidence of age-related degenerative spondylosis. For the compensable conditions, Dr. Mukkamala found that Mr. Blankenship was at maximum medical improvement ("MMI"), except for the right shoulder. Using the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) ("*Guides*"), Dr. Mukkamala found 0% impairment for all conditions except the right shoulder.

In a separate February 25, 2022, IME report, Dr. Mukkamala considered Mr. Blankenship's permanent impairment for the right shoulder. Dr. Mukkamala found that Mr. Blankenship was at MMI for the right shoulder, and that he had a 5% whole person impairment for the right shoulder loss of range of motion. Further, Dr. Mukkamala noted that Mr. Blankenship also underwent a distal clavicle excision, which should not be rated in the claim because it was performed to address a preexisting non-compensable degenerative condition.

By order dated February 28, 2022, the claim administrator granted Mr. Blankenship a 5% PPD award. Mr. Blankenship protested this order to the Board.

On April 6, 2022, Mr. Blankenship underwent an MRI of his cervical spine, which had the impression of a small central disc protrusion at C3-C4, a central disc protrusion at C4-C5, but no central canal stenosis, a small right paracentral disc protrusion at C5-C6, and C6-C7, central and right paracentral disc protrusion extending into the right neural foramen with stenosis and central canal stenosis.

Dr. Mukkamala issued another report dated April 22, 2022, stating that while mild cognitive impairment with memory loss was seen on an initial assessment, three subsequent neurological examinations revealed normal condition. Thus, Dr. Mukkamala found that Mr. Blankenship had reached MMI for the head injury, that headache is only a historical diagnosis and not an acute condition, and that the concussion had reached MMI. Dr. Mukkamala opined that forgetfulness was inconsistent with normal cognition as documented by Dr. Deep.² Further, Dr. Mukkamala opined that cervical stenosis of the spine canal is a degenerative condition and is not causally related to the compensable injuries, that protrusion of a cervical intravertebral disc is degenerative in nature and not causally related to the compensable injuries, and that syncope and forgetfulness/mild cognitive impairment were not active conditions. Dr. Mukkamala did not change his original assessment of 5% WPI for the compensable injuries.

On July 26, 2022, Mr. Blankenship was evaluated by Justin Gray, Psy.D., a clinical psychologist. Dr. Gray diagnosed Mr. Blankenship with mild traumatic brain injury, with loss of consciousness of thirty minutes or less; cognitive impairment; sleep disturbance; current severe episode of major depressive disorder without psychotic features; anxiety; and other chronic pain. Dr. Gray opined that Mr. Blankenship suffered a mild traumatic brain injury from the fall, and that he lost consciousness but had no intracranial pathology. Dr. Gray stated that he would expect minimal neurocognitive and neuropsychological difficulties one year after this type of injury, and that Mr. Blankenship's cognitive functioning was likely impacted by secondary factors, which were either created or exacerbated by the work injury. Dr. Gray also cited the impact of chronic pain on cognition and stated that the more chronic and more severe the pain, the more likely a patient will notice cognitive difficulties.

On November 1, 2022, Mr. Blankenship underwent an additional IME performed by Bruce Guberman, M.D. Mr. Blankenship reported that he fell approximately six feet off of a forklift and landed on the front of his head and also on his right shoulder and the right side of his body, and that he was unconscious for an unknown period of time. Dr. Guberman's impression was chronic posttraumatic strain of the right shoulder, status post right rotator cuff tear and status post right shoulder arthroscopy, right shoulder subacromial

² This Court notes that the records from Mr. Blankenship's treatment with Dr. Deep were not submitted on appeal.

decompression, and right shoulder distal clavicle excision, right shoulder rotator cuff repair on 8/2/2021; chronic posttraumatic strain and fracture of the right wrist and contusion of the right hand; history of contusion of the right knee; and contusion of the head. Dr. Guberman noted that the diagnoses of chronic posttraumatic strain of the cervical spine with aggravation of preexisting degenerative joint and disc disease and radiculopathy and mild traumatic brain injury with loss of consciousness of thirty minutes or less, were in his opinion related to the injury but were not considered compensable at the time of his evaluation.

Using the *Guides*, Dr. Guberman found that Mr. Blankenship would have 10% upper extremity impairment for the distal clavicle resection and 15% upper extremity impairment for range of motion abnormalities, which he combined for a total of 24% upper extremity impairment. Dr. Guberman converted the 24% upper extremity impairment to 14% WPI. Dr. Guberman found 0% impairment for the right wrist injury, the right knee, and the head contusion. For conditions that were not compensable, Dr. Guberman felt that Mr. Blankenship had 10% cervical impairment, and based on Dr. Gray's evaluation from Table 2, page 142 of the *Guides*, Dr. Guberman opined that Mr. Blankenship had 7% impairment from Category I.

Christopher Martin, M.D., performed an IME of Mr. Blankenship on December 1, 2022. Dr. Martin stated that at the time of the compensable injury, Mr. Blankenship had active neck pain with extensive and severe degenerative findings at multiple levels on imaging and severe sensorimotor polyneuropathy of both arms. Dr. Martin did not feel that Mr. Blankenship suffered any compensable injury of the cervical spine and noted that Mr. Blankenship's clinical imaging studies prior to the compensable injury showed severe degenerative findings, including at the C6-C7 level. Dr. Martin did not believe that Mr. Blankenship's syncope, mild cognitive impairment/forgetfulness, bilateral carotid stenosis, and cervical spine stenosis were causally related to the compensable injury. He explained that carotid artery stenosis is most frequently caused by generalized medical conditions like peripheral artery disease, diabetes, and high cholesterol. Dr. Martin opined that Mr. Blankenship did not suffer a significant traumatic brain injury, and a referral for a neuropsychological evaluation was not necessary.

Dr. Martin did not find any permanent impairment attributable to the head contusion and disagreed with Dr. Guberman's finding of 7% impairment for mental status impairment. He found no impairment for the cervical spine, agreed with Dr. Mukkamala's conclusion that no impairment was indicated for the distal clavicle resection, and found 0% impairment for the right elbow and right hand, skin abrasion, and right knee strain. Further, Dr. Martin opined that Dr. Mukkamala's finding of 5% impairment for the right rotator cuff was reasonable.

On January 15, 2023, Robert Walker, M.D., performed an additional IME of Mr. Blankenship. Dr. Walker noted that Mr. Blankenship had evidence of a closed head injury

with loss of consciousness and mild traumatic brain injury. He cited the factors from 4.1, *Disturbances of Mental Status and Integrative Functioning*, of the *Guides* in assigning impairment for Mr. Blankenship's central nervous system head injury. He assessed 14% impairment for the right shoulder, 7% for the central nervous system, and 4% for the right knee, which he combined for 23% WPI.

By order dated May 1, 2023, the Board modified the claim administrator's January 14, 2022, order denying treatment, and authorized the neuropsychological evaluation by Dr. Gray. The Board also modified the claim administrator's April 28, 2022, order to reflect that mild cognitive impairment/forgetfulness be added as a compensable condition in the claim.

On June 5, 2023, Jennifer Lultschik, M.D., performed an IME of Mr. Blankenship. Dr. Lultschik listed contusion of the head, resolved; right shoulder sprain/strain, resolved; right shoulder rotator cuff tear, resolved; contusion of the right knee, resolved; contusion of the right hand, resolved; avulsion fracture of right wrist, resolved; and superficial abrasions, resolved, as conditions that were a result of the compensable incident on June 23, 2021. Dr. Lultschik also noted that mild cognitive impairment/forgetfulness had also been added as a compensable injury and would be considered for impairment calculation. Dr. Lultschik opined that Mr. Blankenship was at MMI for all of his compensable injuries. Using the *Guides*, Dr. Lultschik found that Mr. Blankenship had 0% impairment for contusion of his head, 0% impairment for the right knee, 0% impairment for contusion of the right hand, 0% impairment for superficial abrasions, and 0% impairment for the resolved fracture of the right wrist. With respect to the right shoulder strain/sprain, Dr. Lultschik found 4% WPI. Dr. Lultschik noted that as observed by Dr. Martin, 5% impairment for the right shoulder injury was not unreasonable.

For the diagnosis of mild cognitive impairment/forgetfulness, Dr. Lultschik found that there was no evidence of mild cognitive impairment on mental status assessment, nor has there been on several past mental status examinations. She noted that Mr. Blankenship had a Mini-Mental Status Examination ("MMSE") score in the normal range. Dr. Lultschik also noted that Mr. Blankenship demonstrated evidence of chronic preexisting vascular disease and ischemic changes in the brain, as well as a history of alcohol abuse, which placed him at increased risk of toxic neurological injury; and that these changes are progressive and would account for the changes noted by Mr. Blankenship and his wife, even though his MMSE score was normal. Dr. Lultschik found that Mr. Blankenship would have 0% whole person impairment for the diagnosis of mild cognitive impairment/forgetfulness. Combining impairments for all the compensable diagnoses, Dr. Lultschik found that Mr. Blankenship had 4% impairment, and she indicated that because he was already awarded a 5% PPD award no further award was needed.

By order dated April 16, 2024, the Board affirmed the claim administrator's order, which granted a 5% PPD award. The Board concluded that Dr. Lultschik's IME was the

most credible, as she was the most recent evaluator, she considered all of the compensable diagnoses in the claim, she reviewed Mr. Blankenship's extensive medical records, and she appropriately applied the *Guides* to evaluate Mr. Blankenship. The Board noted that Dr. Guberman did not consider the diagnosis of mild cognitive impairment/forgetfulness and did not include any of the required factors in concluding that Mr. Blankenship had 7% WPI under Table 2 of the *Guides*.³ It is from this order that Mr. Blankenship 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*, __W. Va. __, 905 S.E.2d 528 (2024).

On appeal, Mr. Blankenship argues that the Board was clearly wrong in relying on Dr. Lultschik's report, and that the Board relied on her report solely because she was the

³ As noted by the Board, the *Guides* provide in 4.1b, *Disturbances of Mental Status and Integrative Functioning*, that documentation of mental status should include the following characteristics:

- (1) Orientation concerning time, person, and place;
- (2) recent recall;
- (3) ability to remember and repeat a series of digits and repeat them in reverse order;
- (4) ability to perform a serial subtraction of 7s from 100 or 3s from 20;
- (5) ability to do other simple calculations;
- (6) ability to repeat three unrelated words;
- (7) ability to spell a word such as "world" forward and backward;
- (8) ability to repeat a short paragraph;
- (9) ability to understand and explain proverbs or abstract thoughts; and
- (10) judgement.

most recent evaluator. Further, Mr. Blankenship argues that the Board should have relied on Dr. Guberman’s report, as it was more reliable. Finally, Mr. Blankenship argues that he is entitled to a 20% PPD award based on Dr. Guberman’s report. We disagree.

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 are unable to conclude that the Board was clearly wrong in granting Mr. Blankenship a 5% PPD award, which was supported by the opinions of Drs. Lultschik, Mukkamala, and Martin.

The Board found that Dr. Lultschik’s report was the most persuasive, as she was the most recent evaluator, she considered all compensable diagnoses in this claim including mild cognitive impairment/forgetfulness, she reviewed Mr. Blankenship’s extensive medical records, and she appropriately applied the *Guides*. Further, as noted by the Board, Dr. Lultschik’s findings with regard to the right shoulder, right wrist, and right knee are consistent with those of Drs. Mukkamala and Martin. The Board found that Dr. Walker’s report was an unreliable outlier due to the finding of right knee impairment. Although Mr. Blankenship argues that the Board should have relied on Dr. Guberman’s report, his 7% impairment rating was based on Table 2 on page 142 of the *Guides*, and he did not include analysis of any of the ten factors that should be considered for documentation of mental status as required by 4.1b *Disturbances of Mental Status and Integrative Function*. Additionally, his report did not consider the compensable diagnosis of mild cognitive impairment/forgetfulness. Based on the foregoing, the Board found Dr. Guberman’s report to be less persuasive than Dr. Lultschik’s report. We find no error in this decision and defer to the Board’s credibility determinations. *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. . . .”).

Accordingly, we affirm the Board’s April 16, 2024, order.

Affirmed.

ISSUED: October 28, 2024

CONCURRED IN BY:

Judge Charles O. Lorensen

Judge Daniel W. Greear

Chief Judge Thomas E. Scarr, not participating