

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**HARVEY HILL,
Claimant Below, Petitioner**

v.) No. 24-ICA-212 (JCN: 2020007131)

**LOWE’S HOME CENTERS, INC.,
Employer Below, Respondent**

**FILED
October 28, 2024**

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

MEMORANDUM DECISION

Petitioner Harvey Hill appeals the May 1, 2024, order of the Workers’ Compensation Board of Review (“Board”). Respondent Lowe’s Home Centers, Inc., (“Lowe’s”) filed a response.¹ Mr. Hill did not reply. The issue on appeal is whether the Board erred in affirming the claim administrator’s order, which granted Mr. Hill a 0% 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.

On July 4, 2019, while employed by Lowe’s, Mr. Hill suffered an injury by inhalation of toxic material related to spray painting being performed at his workplace. Mr. Hill completed an Employees’ and Physicians’ Report of Occupational Injury or Disease. The physician’s portion of the form was completed by a provider at MedExpress; it indicated that Mr. Hill sought treatment on August 22, 2019, and was diagnosed with an occupational injury to his “neuro system” due to exposure to “other hazardous, chiefly nonmedicinal, chemicals.”

On August 22, 2019, Mr. Hill was seen at MedExpress for numbness, weakness, and headaches after he inhaled a toxic material at work. After an examination, Mr. Hill was referred to the emergency room (“ER”) at Raleigh General Hospital for further evaluation. Mr. Hill was seen in the ER on the same day. Mr. Hill reported dizziness at night and

¹ Mr. Hill is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq. Lowe’s is represented by Tracey B. Eberling, Esq.

paresthesias to the second and third digits of his right hand after chemical exposure at work. The claim administrator issued an order dated September 26, 2019, holding the claim compensable for the diagnosis of chemical inhalation.

Mr. Hill underwent an MRI of his brain/head without contrast on July 21, 2022, revealing prominent bifrontal cerebrospinal fluid spaces, probably due to atrophy. No acute infarction or mass was noted, and no significant chronic microvascular ischemic changes were noted.

Mr. Hill was seen by Soham Sheth, M.D., a neurologist, on December 7, 2022. Mr. Hill reported that he was having balance difficulties and ataxia, but Dr. Sheth observed that it was unclear if Mr. Hill's vertigo symptoms were related to his exposure to spray paint, and that the MRI of his brain showed no acute abnormalities. Dr. Sheth opined that he needed to evaluate Mr. Hill's cervical spine for causes related to ataxia and requested a cervical MRI. Dr. Sheth further opined that it would be part of the inhalation workers' compensation claim. Dr. Sheth requested a referral for physical therapy for the diagnosis of ataxia.

On April 5, 2023, John Talbott, M.D., performed an independent medical evaluation of Mr. Hill. Mr. Hill reported that he developed a number of complaints, including failing memory, shaking, difficulty walking, pains, numbness in his hands and feet, and swelling in his legs after being exposed to Rustoleum spray paint on July 4, 2019. Mr. Hill further reported that he had preexisting conditions of diabetes mellitus, insulin dependent; hypertension; hyperlipidemia; venous insufficiency; and depression. Dr. Talbott noted that Mr. Hill had a shaking condition, which was associated with gait instability, and some observers thought he had Parkinson's, while others believed he had a non-Parkinsonian shaking condition. Mr. Hill reported a history of extremity paresthesias involving both lower extremities. Dr. Talbott noted that the numbness in Mr. Hill's hands and arms predated the compensable inhalation injury.

Dr. Talbott reported that Mr. Hill did not complain of cervical pain, but he exhibited essential tremor, generalized polyneuropathy with areflexia in both lower extremities, and graded sensory loss to the level of the knees bilaterally. Dr. Talbott noted that Mr. Hill exhibited a graded sensory loss in both upper extremities up to the level of the mid-forearm and a limited range of cervical motion in all planes, compatible with a diagnosis of cervical spondylosis. Dr. Talbott opined that Mr. Hill's complaint of shooting, tingling pains radiating down both arms was compatible with Lhermitte's sign. Dr. Talbott concluded that Mr. Hill's paresthesias and difficulty with ambulation related to multiple entrapment neuropathies and diabetic polyneuropathy and the cognitive impairment could be explained by his volume loss on the MRI scan of the brain. Dr. Talbott opined that Mr. Hill could have experienced a headache on the day of the toxic exposure, but chronic headaches were not related to the exposure and could be explained by Mr. Hill's other medical problems.

Using the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) ("*Guides*"), Dr. Talbott found that Mr. Hill has 0% impairment related to his compensable injury.

On July 26, 2023, Dr. Sheth authored a report indicating that Mr. Hill was exposed to spray paint while working in July 2019. Mr. Hill experienced an immediate headache and numbness in all fingers and felt off balance. Mr. Hill continues to have headaches, dizziness, paresthesias in his fingers, and tremors. Dr. Sheth said toluene and benzene could be found in acrylic spray paint and that exposure could cause toxicity throughout the body, including the central and peripheral nervous system. Dr. Sheth opined that Mr. Hill's symptoms, including headaches, balance difficulties, paresthesias, and tremors were possibly related to his exposure to spray paint, however, it was unclear if a one-time exposure would lead to chronic symptoms lasting more than three years. Dr. Sheth believed that an MRI of the cervical spine was necessary to rule out other etiologies, which could lead to similar symptoms.

Mr. Hill was evaluated by Bruce Guberman, M.D., on August 7, 2023. Dr. Guberman opined that the diagnoses of vertigo and tremors were related to Mr. Hill's compensable chemical exposure injury. Using the *Guides* Table 11 on page 146, Dr. Guberman found that Mr. Hill had 5% impairment related to "[m]inimal impairment of equilibrium" with "limitation required only of activities in hazardous surroundings." Dr. Guberman referred to Table 15 on page 148 of the *Guides* and found that Mr. Hill fell into the category described as "Patient can use both upper extremities for self-care, grasping and holding, but has difficulty with digital dexterity," for which he recommended 10% impairment. Dr. Guberman opined that Mr. Hill had a total of 15% impairment related to the compensable injury.

On May 1, 2024, the Board issued an order affirming the claim administrator's order granting Mr. Hill a 0% PPD award. The Board found that Mr. Hill has 0% impairment related to his compensable injury based on Dr. Talbott's report. Mr. Hill 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.

Syl. Pt. 2, *Duff v. Kanawha Cnty. Comm'n*, __W. Va. __, 905 S.E.2d 528 (2024).

Mr. Hill argues that the Board disregarded the evidence establishing that he began experiencing the symptoms of tremor and vertigo after the compensable chemical exposure occurred. Mr. Hill further argues that the Board did not find that Dr. Guberman's report was flawed in his application of the *Guides*; therefore, the Board should have adopted his report pursuant to West Virginia Code § 23-4-1g.² We disagree.

Here, the Board found that Mr. Hill has 0% impairment related to his compensable injury based on the report of Dr. Talbott. The Board noted that Dr. Talbott assessed impairment based upon the compensable diagnosis of chemical inhalation, while Dr. Guberman included impairment ratings for noncompensable conditions. Thus, the Board found that Dr. Talbott's report was more credible than Dr. Guberman's report.

² West Virginia Code § 23-4-1g(a) (2003) provides that,

[f]or all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.

Upon review, we conclude that the Board was not clearly wrong in finding that Mr. Hill failed to establish that he has more than 0% impairment related to the compensable injury. 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 affirming the claim administrator’s order granting Mr. Hill a 0% PPD award.

Further, contrary to Mr. Hill’s argument, he is not entitled to the matter being resolved in his favor pursuant to West Virginia Code § 23-4-1g, as the Board did not find that the report of Dr. Guberman was of equal evidentiary weight to the reports of Dr. Talbott. Given the Board’s findings, we cannot find that it erred in granting Mr. Hill a 0% PPD award, in accordance with the recommendation of Dr. Talbott.

Accordingly, we affirm the Board’s May 1, 2024, order.

Affirmed.

ISSUED: October 28, 2024

CONCURRED IN BY:

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