IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

E. B.,[1]

Petitioner, **Appeal Number:**

and

ALLIANCE COAL, LLC,

Respondent.

E.B.'S PETITION FOR APPEAL

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[1] By Order dated February 9, 2023, the Intermediate Court of Appeals of West Virginia amended the case style using only Petitioner's initials, stating: "Due to the sensitive facts involved, the Court, on its own motion, amends the case style of this appeal to the style reflected in the case caption set forth in this order. *See* J. M. v. Altice Technical Service USA, Inc., No. 20-0302, 2021 WL 3030368, at *1 n.1 (W. Va. July 19, 2021) (memorandum decision)."

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I. ASSIGNMENT OF ERROR

Whether the Intermediate Court of Appeals erred by not remanding this matter, upon the motion of Petitioner, for the taking of such new, additional, or further evidence in accordance with West Virginia Code of State Regulations § 85-20-12.4, which is necessary for a full and complete development of Petitioners compensable psychiatric injuries.

West Virginia Code of State Regulations § 85-20-12.4 governs the compensability of psychiatric claims and requires evaluation by a psychiatrist. As set forth below, Petitioner was referred for psychiatric treatment by one of his medical providers and neither Petitioner, Petitioner's spouse, counsel for Petitioner nor the Board of Review knew that Petitioner's treating psychiatrist - at West Virginia University, Chestnut Ridge Center for Behavioral Medicine - did not meet the requirements of the regulation. Accordingly, Petitioner, for good cause shown, merely seeks a limited, narrow remand of this claim for the purpose of allowing Petitioner to obtain a psychiatric evaluation which meets all of the requirements of 85 CSR § 20-12.4.

II. STATEMENT OF THE CASE

On August 30, 2020, E.B., a coal miner with limited experience, was severely injured while working underground for the employer. He was positioned in the "Line of Fire" of a 1.5-inch hydraulic pressurized hose, which supplied fluids to equipment used during longwall production, when it suddenly and forcibly discharged causing the hose to "whip" and hit him about the face and head and knocking him down. As a result, Plaintiff suffered serious physical and psychological injuries.

Specifically, he suffered a shattered orbit of the right eye and right cheekbone and other facial fractures; traumatic brain injury with concussion; swelling of the brain; a broken jaw; multiple chipped and broken teeth, one below the gum line; broken ribs; strained ligaments of the

back and left shoulder; lacerations of the face, forehead and left arm which required twenty-two stiches around his eye, eighteen stitches on his forehead and other stitches and sutures from surgical procedures; as well as other cuts and bruises. *See* Hospital Photo of Petitioner in Appendix at 17. Further, he suffered severe psychological injuries – which have progressed - for which he has been receiving ongoing treatment since shortly after the incident.

A few days after his urgent physical injuries were medically addressed, Petitioner was evaluated and began treatment with the West Virginia University Concussion Clinic. He began experiencing psychological issues and, on October 14, 2020, Respondent approved a request from Petitioner's treating physician for a psychiatry referral. Shortly thereafter, Petitioner began psychological treatment for issues directly and proximately caused by the incident.

After the application for workers' compensation benefits was filed, the claim was held compensable for multiple physical injuries and the psychological injuries of "adjustment disorder with mixed anxiety and depressed mood." Petitioner's psychological injuries progressed, and his treating doctors, psychologist, clinicians, and a psychiatrist resident at Chestnut Ridge Center for Behavioral Medicine at West Virginia University (hereinafter "WVU") (who Petitioner, Petitioner's spouse, Petitioners Counsel, and the Board of Review mistakenly thought was a psychiatrist)[2] diagnosed PTSD, developed a treatment plan with goals, prescribed additional medications, and sought to have his diagnosis upgraded so that he could receive the required treatment to help his condition. The Respondent, who is self-administering this claim, denied all of these opinions, treatment plans, goals, and medications.

[2] Petitioner was referred to Dr. Zell by one of his medical providers. Both he and his wife thought that Dr. Zell was a licensed psychiatrist. Further, until the matter was before the Intermediate Court of Appeals, Petitioner, his spouse, and Petitioner's counsel all thought that Dr. Zell was a licensed psychiatrist. Moreover, the Board of review "was under the incorrect impression that Dr. Zell was a board-certified psychiatrist . . . . *See* Memorandum Decision of the Intermediate Court of Appeals at pp. 4-5 in Appendix at 38.

This progression was clearly evident on November 18, 2021, when Petitioner participated in a follow-up visit with West Virginia University Medicine for his psychological injuries and reported a worsening in mood and anxiety, hypervigilance with loud noises and bright lights, and an increase in suicidal thoughts. *See* Records from West Virginia University Medicine in Appendix at 6. The medical records documenting this follow-up visit were provided to counsel for Respondent.

After reviewing these records, counsel for Respondent acknowledged that Petitioner's condition had worsened from the original diagnosis, that he may be a harm to himself or others and considered calling the police to conduct a welfare check on Petitioner. *See* Electronic Mail from James Heslep, Esquire dated December 7, 2021, in Appendix at 8.

The concerns expressed by Counsel for Respondent dovetail with the actual findings and opinions of Petitioner's treating physicians, all of whom evaluated and treated Petitioner for quite some time.

Specifically, Mr. Baker is being treated by Dr. Matthew S. Zell at West Virginia University Health Sciences.[3] Dr. Zell issued a report on May 10, 2022, in which he opined that Petitioner has:

> 1. Major Depressive Disorder, severe, without psychotic features (F33.2)
> 2. Generalized Anxiety Disorder (F41.1)
> 3. Post-Traumatic Stress Disorder (F43.10) as supported by the following diagnostic features:
>
> -Patient personally experienced a traumatic event.
> -Patient endorses having recurrent distressing dreams about the event
> -Patient experiences psychological distress on exposure to cues reminding him of the traumatic event
> -Patient exhibits avoidance of experiences containing stimuli related to the traumatic event. This behavior began after the traumatic event.
> -Patient exhibits persistent negative beliefs about himself since the time of the traumatic event. This has also negatively impacted his mood.
> -Patient has had significant impairment in his social and occupational functioning

[3] *See* footnote 2, supra.

since the time of the event.
-The duration of these symptoms is greater than 1 month.

See Report of Matthew S. Zell, M.D. dated May 10, 2022 in Appendix at 14.

More recently, Dr. Zell stated that Mr. Baker is currently being treated for the following diagnoses:

1. Major Depressive Disorder, recurrent severe without psychotic features (F33.2)
2. Generalized Anxiety Disorder (F41.1)
3. Post-Traumatic Stress Disorder (F43.1)

Further, Dr. Zell stated:

> The patient qualifies for the Diagnosis of Post-Traumatic Stress Disorder based on the following criteria:
>
> - Recurrent, involuntary, intrusive, and distressing memories of this event.
> - Avoidance of external reminders of this event.
> - Alterations in his mood subsequent to this event.
> - Disturbance in his sleep with associated nightmares related to this traumatic event.

Moreover, Dr. Zell stated:

> Our recommendation based on his diagnosis of PTSD and his current symptoms includes that the patient take a medication that treats trauma-related nightmares. He was first prescribed Prazosin, the first-line and standard of care treatment for trauma-related nightmares in PTSD, but could not tolerate this medication at therapeutic doses due to the side effect of rebound insomnia. Because of this, our recommendation was for the patient to take a medication with similar effects at downregulating the adrenergic system before going to sleep. We therefore recommend Clonidine to be taken nightly before bed for treatment of trauma-related nightmares. The patient has also been prescribed Cyproheptadine by his previous provider to treat anxiety related to initial insomnia, which he has found to be effective at treating his initial insomnia. We feel that both Clonidine and Cyproheptadine are indicated for treatment of PTSD and the related sleep disturbances contributing to this patient's burden of disease. Of note, the patient has gotten insufficient relief with alternative medications that have been tried, including Trazodone and hydroxyzine.

See Report of Matthew S. Zell, M.D. dated July 15, 2022 in Appendix at 16.

Petitioner acknowledges that West Virginia Code of State Regulations § 85-20-12.4 requires that psychiatric opinions be expressed by a psychiatrist. Petitioner was referred to WVU for treatment. However, Petitioner, his spouse, counsel for Petitioner, and even the Board of

Review were under the incorrect impression that Dr. Zell was a psychiatrist. In fact, it was not discovered, until after the final decision of the Board of Review and just before oral argument before the Intermediate Court of Appeals, that Dr. Zell was not a psychiatrist.[4]

As support for remanding this claim, virtually all of Petitioner's treating physicians have opined that PTSD should be added to his compensable diagnosis. Specifically, Petitioner was evaluated by Dr. Patricia Bailey, a psychologist in Wheeling, West Virginia. Dr. Bailey found Petitioner to be suffering from mental injuries directly caused from the subject unsafe operation. Dr. Bailey opined, among other things, that Petitioner "is experiencing significant anxiety, depression, and trauma related symptoms," that Plaintiff's "symptoms have caused significant impairment in multiple areas of functioning including cognitive, affective, behavioral, interpersonal, and occupational domains," and that he has "psychological conditions of PTSD [Post Traumatic Stress Disorder] and comorbid depression are a direct result of his traumatic accident and injury which occurred on August 30, 2020." *See* Report of Patricia M. Bailey, Ph.D., L.P.C., N.C.C dated December 14, 2021in Appendix at 10.

Further, Dr. Kenneth A. Visser, a clinical psychologist, provided the following opinions:

> Diagnoses: PTSD; Adjustment Disorder with mixed anxiety and depressed mood, severe.
>
> [Petitioner] was complaining of pressure in the head, neck pain, nausea, dizziness, blurred vision, difficulty with balance, sensitivity to light and noise, feeling slowed down, foggy, not feeling right. Other symptoms included difficulty with concentration, memory, fatigue, confusion, drowsiness.
>
> The claimant is motivated to change. However, more aggressive mental health treatment is needed.

See Report of Kenneth A. Visser, Ph.D. dated December 1, 2021 in Appendix at 7.

Additionally, Dr, Michael Rosenberg evaluated Petitioner and opined as follows:

DIAGNOSIS:

[4] *See* Memorandum Decision of the Intermediate Court of Appeals at p. 5 in Appendix at 38.

1. Back pain, moderate.
2. Post-concussion syndrome characterized by double vision by history, photophobia, headache by history, and dizziness noted when he arose from the supine position.
3. Status post facial fracture now with decreased sensation right side of his face and mild pain involving the left side of his face.
4. Posttraumatic stress disorder/depression.

PROGNOSIS:
Unknown.

See Report of Michael Rosenberg, M.D. dated December 10, 2021 in Appendix at 9.

After treating Petitioner for more than a year, Dr, Franklin Curry, at West Virginia University Medicine, stated:

> He continues, in my opinion, to experience anxiety and depression at initial and even increased levels, and these symptoms have continued far beyond the six-month limit specified in the DSM-5 for Adjustment Disorder. [Petitioner] has continued to report and exhibit symptoms of PTSD to an extent that causes significant impairment in his ability to return to work. I have previously estimated this impairment to be in a moderate range, which I and others have estimated to be at 50%, with a range between 25% and 75% in my opinion.

See Report of Franklin Curry, Psy.D. dated February 28, 2022 in Appendix at 12.

On April 22, 2022 - Dr. Franklin Curry submitted a detailed treatment plan which provided the following goals and objectives:

> Goal I: Reduction in PTSD symptoms (e.g., flashbacks, intrusive thoughts, anxiety/panic, anger, and depression)
>
> Objective 1: Understanding process of how PTSD symptoms develop.
> Objective 2: Learning skills for coping with symptoms
> Objective 3: Practicing methods for emotional, cognitive, and behavioral self-regulation
> Objective 4: Understanding stages of grief: denial, bargaining, anger, depression, acceptance.
> Objective 5: Maintaining medication regimen.
>
> Goal II: Resuming normative behavior and routines on a daily basis.
>
> Objective 1: Setting daily schedule for activities.
> Objective 2: Setting daily and weekly goals for accomplishment of tasks.
> Objective 3: Charting progress
> Objective 4: Developing reward (positive reinforcement) system for accomplishment of goals.

Objective 5: Learning cognitive and mindfulness skills for addressing negative thinking and correcting cognitive errors in thinking,

Goal III: Developing long-range formulation of purpose and meaning of life; priorities for self and family; achieving security and stability.

Objective 1: Reframing view of personal worth and competence
Objective 2: Financial planning
Objective 3: Setting longer-range goals for personal accomplishment to enhance sense of competence and self-worth.
Objective 4: Developing parenting and partnership skills to deal with emotional challenges in family.

Methods

Cognitive-behavioral Therapy: to address errors in thinking, challenge negative beliefs, and to learn self-help skills for coping with anxiety, panic, anger, and depression.

Mindfulness and Meditation: to learn attentional focus, self-calming, value of living in the "here and now," and breathing and relaxation techniques.

Exposure Therapy: to address in vivo desensitization for triggers of flashback and intrusive thoughts, typically involving both covert and experiential systematic desensitization to traumatic stimuli.

Coping and Support

Follow treatment plan
Learn about PTSD
Take care of self
Avoid self-medication
Break the cognitive-behavioral cycle
Stay connected to family and friends
Consider support group/ prosocial activities

See Report of Franklin Curry, Psy.D. dated April 22, 2022 in Appendix at 13.

Finally, Dr. David Lynch, at West Virginia University, Petitioner's treating physician, filed a Diagnosis Update on May 16, 2022 listing the primary diagnosis as PTSD. *See* Diagnosis Update by Dr. David Lynch in Appendix at 15.

The written opinions of Petitioner's treating physicians have been consistent and clearly support Major Depressive Disorder, severe; Generalized Anxiety Disorder; and Post-Traumatic Stress Disorder. These reports – along with the concerns expressed by Employers counsel –

unequivocally support updating his compensable diagnoses so that he can begin the required treatment. Accordingly, this matter should be remanded for Petitioner to be evaluated by a certified psychiatrist for a full and complete development of Petitioners compensable psychological injuries in accordance with West Virginia Code of State Regulations § 85-20-12.4.

III. SUMMARY OF THE ARGUMENT

Because Petitioner, his spouse, counsel for Petitioner, and even the Board of Review were under the incorrect impression that Dr. Zell was a certified psychiatrist - a fact that was not discovered until after the final decision of the Board of Review and just before oral argument before the Intermediate Court of Appeals - and because the opinions of his other treating physicians are consistent in that all have supported updating his compensable diagnosis to PTSD, this matter should be remanded for the limited and narrow purpose of allowing Petitioner to obtain a psychiatrist to fully evaluate his compensable psychological injuries in accord with 85 CSR 20-12.4.

IV. STATEMENT REGARDING ORAL ARGUMENT

Petitioner believes his request for an order remanding the matter for further development of his psychiatric injuries is well-documented and straight-forward and does not require oral argument. However, should the Respondent request oral argument or should the Court believe, that oral argument would aid in its decision, then Petitioner has no objection would certainly participate in oral argument.

V. ARGUMENT

A. The Medical Evidence Clearly Supports Remanding This Claim to Allow a Substantive Evaluation of Petitioners Psychiatric Injuries by a Licensed Psychiatrist In Accord with WV CSR § 85-20-12.4

The West Virginia Code of State Regulations governs compensability of psychiatric claims. Specifically, it provides:

> 12.4. Compensability. Services may be approved to treat psychiatric problems only if they are a direct result of a compensable injury. As a prerequisite to coverage, the treating physician of record must send the injured worker for a consultation with a psychiatrist who shall examine the injured worker to determine 1) if a psychiatric problem exists; 2) whether the problem is directly related to the compensable condition; and 3) if so, the specific facts, circumstances, and other authorities relied upon to determine the causal relationship. The psychiatrist shall provide this information, and all other information required in section 8.1 of this Rule in his or her report. Failure to provide this information shall result in the denial of the additional psychiatric diagnosis.

85 CSR 20-12.4. As set forth above, Petitioner thought Dr. Zell was a psychiatrist up to the point of oral argument before the Intermediate Court of Appeals. However, the medical evidence clearly supports remanding the claim for a full evaluation by a psychiatrist.

As shown by the chart below, Petitioner's medical providers overwhelmingly believe that he has PTSD and should be treated with medications and therapy, all of which have been denied for failing to meet all of the requirements of 85 CSR 20-12.4. On the other hand, the report submitted by from Respondent from Dr. Mazzorana - who only saw the appellant one time - more than eighteen (18) months ago - is the only medical expert to opine that Petitioner does not have PTSD and should not receive treatment for the same.

	PTSD DIAGNOSED			**PTSD NOT DIAGNOSED**
5/10/2022 **Dr. Matthew S. Zell** **West Virginia University** (In Appendix at 14.) **7/15/2022** **Dr. Matthew S. Zell** **West Virginia University** (In Appendix at 16.)	***Diagnosis of PTSD, etc.*** ***Diagnosis of PTSD, etc and sets forth criteria***		12/1/2021 Ivan Mazzorana, M.D. Fort Myers, Florida (In Appendix at 28.)	- Adjustment disorder; no PTSD - Malingering - No psych impairment - *"Mr. Baker now presents describing some symptoms of PTSD in what is in my opinion a tainted canvass."* - "I am not certain what further care would have to offer other than the ability to vent." - "Mr. Baker has filed for disability and has no intentions of returning to work."

	PTSD DIAGNOSED			**PTSD NOT DIAGNOSED**
				- "There is no clear documentation to support PTSD which certainly could warrant long-term treatment." - Should the carrier authorize additional treatment, then "I strongly recommend that there are identifiable goals which can also be measures. Otherwise, everything will continue to hinge on Mr. Baker feeling 'just right' to be able to return to gainful employment."
12/1/2021 **Kenneth Visser, Ph.D.** **Sarasota, Florida** (In Appendix at 7.)	**- Dx: "*PTSD, adjustment disorder with mixed anxiety and depressed mood, severe"*** **- "The claimant is motivated to change. However, more aggressive mental health treatment is needed."**			
12/7/2021 **Electronic Mail - Counsel for Employer/Appellee** (In Appendix at 8.)	***Counsel for Employer/Appellee expressed concern for Plaintiffs "increase in suicidal ideation with reported possession of a gun" and stated "this seems to be a significant worsening of this issue. . . ." Counsel further stated: "My client [Employer/Appellee] is considering calling the local police . . . to***			

	PTSD DIAGNOSED			**PTSD NOT DIAGNOSED**
	conduct a welfare check on [Plaintiff].			
12/10/2021 **Michael Rosenberg, M.D.** **IMA Evaluations, Inc.** **Sarasota, Florida** (In Appendix at 9.)	**1. Back pain. Moderate.** ***2. Post-concussion syndrome characterized by double vision by history, photophobia, headache by history, and dizziness noted when he arose from the supine position.*** **3. Status post facial fracture now with decreased sensation right side of his face and mild pain involving the left side of his face.** ***4. Posttraumatic stress disorder/depression.***			
12/14/2021 **Patricia Bailey, Ph.D., L.P.C., N.C.C.** **Wheeling, West Virginia** (In Appendix at 10.)	**- Criticizes Dr. Mazzorana's opinion due to "lack of psychological testing to assess for PTSD or depression"** ***- Dx: PTSD and comorbid depression from incident*** ***- Not reached MMI. Recommends additional treatment***			
2/21/2022 **Franklin Curry, Ph.D.** **WVU Medicine** (In Appendix at 11.)	***Completed reopening application***			

	PTSD DIAGNOSED			**PTSD NOT DIAGNOSED**
2/28/2022 **Franklin Curry, Ph.D.** **WVU Medicine** (In Appendix at 12.)	***- Disagrees with Dr. Mazorana*** ***- Dx: PTSD***			
4/22/2022 **Franklin Curry, Ph.D.** **WVU Medicine** (In Appendix at 13.)	***Treatment Plan for PTSD etc.***			
5/16/2022 **Dr. David Lynch** **West Virginia University** (In Appendix at 15.)	***Requested Diagnosis Update for PTSD***			
11/18/2021 **Jullian D. Conrad-APRN, NP-C** **WVU Medicine** (In Appendix at 6.)	**"The patient presents today reporting a worsening in mood and anxiety. . . ." Discontinues some meds due to adverse effects.** **-Dx: "MDD, severe, without psychotic features: GAD; *r/o PTSD"***			

For good cause shown and based upon the multitude of opinions from Petitioners medical providers, Petitioner merely seeks a "limited remand" for the purpose of obtaining an evaluation by a psychiatrist. As this Court has noted, a

> remand can be either general or limited in scope. Limited remands explicitly outline the issues to be addressed by the [the lower court] and create a narrow framework within which the [lower court] must operate. General remands, in contrast, give [lower courts] authority to address all matters as long as remaining consistent with the remand.

State of West Virginia ex rel. Advance Stores Company, Inc., 230 W.Va. 464, 740 S.E.2d 59 (2013), *citing* at syllabus point 2, *State ex rel. Frazier & Oxley, L.C. v. Cummings,* 214 W.Va. 802, 591 S.E.2d 728 (2003).

VI. CONCLUSION

Petitioner has suffered serious physical and mental compensable injuries and has shown good cause for why this matter should be remanded for the limited purpose of allowing Petitioner to obtain an evaluation by a psychiatrist who meets the requirements set for in 85 CSR 20-12.4.

Respectfully submitted,

E. William Harvit

Counsel for Petitioner, E.B.

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CERTIFICATE OF SERVICE

I, E. WILLIAM HARVIT, Counsel for the Claimant, hereby certify that a true and exact copy of the foregoing "***E.B.'s Petition for Appeal***" was served upon the following by File & Serve Xpress system on this 10th day of July, 2023.

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