

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**SCA EFiled: Jul 26 2023  
01:01PM EDT  
Transaction ID 70489075**

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CHARLESTON

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E.B.,

Petitioner,

and

Sup. Ct. No.: 23-409  
ICA No.: 22-ICA-278  
JCN: 2021004177  
CCN: WCTR2020388  
DOI: 08-30-2020

ALLIANCE COAL, LLC,

Respondent.

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**BRIEF OF RESPONDENT  
ALLIANCE COAL, LLC**

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ASSIGNMENT OF ERROR

This workers' compensation claim is in litigation pursuant to the Petitioner's protests to the claim administrator's orders of (1) March 4, 2022, which denied reopening of this claim for payment of temporary total disability benefits, (2) March 23, 2022, which denied recognition of post-traumatic stress disorder, major depression, and anxiety as compensable components of this claim, (3) May 20, 2022, which denied authorization of hypertension medications, and (4) July 21, 2022, which denied authorization of the medication Clonidine. By order dated November 2, 2022, the Workers' Compensation Board of Review affirmed these four orders. On June 7, 2023, the Intermediate Court of Appeals affirmed the ruling of the Workers' Compensation Board of Review.

The Petitioner alleges that the that the Intermediate Court of Appeals improperly affirmed the decision of the Workers' Compensation Board of Review.

### STATEMENT OF THE CASE

E.B. is a 32-year old underground coal miner. He sustained compensable injuries on August 30, 2020, when a pressurized hose recoiled and struck him in the head. The strike to the head pushed E.B. forward into a pile of chains. E.B. was evacuated from the mine and flown by helicopter to Ruby Memorial Hospital at West Virginia University. (Appendix at pp. 0116.)

Initial assessment of E.B. at Ruby Memorial Hospital found lacerations of the forehead, cheek, lip, chin, and forearm. He was missing two teeth. Imaging studies identified a right zygomatic maxillary complex fracture. CT scan studies of the brain and cervical spine were unremarkable.

E.B. underwent surgical repair of the facial fracture on August 31, 2020. He underwent surgical repair of a mandibular fracture on September 1, 2020.

E.B.'s workers' compensation claim related to this injury has been deemed to be compensable for (S09.93XA) unspecified injury of the face, (S06.0X0A) concussion without loss of consciousness, (S01.81XA) laceration without foreign body of other part of head, (S02.40CA) fracture of right side of maxilla, (S02.831A) fracture of medial wall of right orbit, (S46.912A) left shoulder strain, (S13.4XXA) cervical spine sprain, (S33.5XXA) lumbar spine sprain, and (F43.23) adjustment disorder.

On September 8, 2020, E.B. initiated treatment at the West Virginia University Sports Medicine & Concussion Clinic with Dr. Benjamin Moorehead. At that time, E.B. complained of dizziness and nausea.

E.B. initiated care with Dr. Jennifer Lultschik at the West Virginia University Occupational Medicine Clinic on September 15, 2020. Dr. Lultschik assumed the role of treating physician under E.B.'s workers' compensation claim. At that time, he reported ongoing pain complaints with regard to his face, neck, and left shoulder.

Stabilization wiring in E.B.'s jaw was removed on September 28, 2020, and E.B. initiated physical therapy.

E.B. underwent an independent medical evaluation with Dr. James L. Cosgrove on January 29, 2021. Dr. Cosgrove is board-certified in physical medicine and rehabilitation. Dr. Cosgrove did not find typical presentation of traumatic brain injury or post-concussion syndrome at the time of his evaluation. He believed E.B.'s reported symptoms to be more suggestive of depression. Dr. Cosgrove encouraged E.B. to engage in a more active lifestyle, and he expected general improvement in E.B.'s condition over time. Dr. Cosgrove found that E.B. had not yet achieved maximum medical improvement with regard to his injuries and recommended that he continue on his present course of treatment. Dr. Cosgrove recommended that E.B. undergo a full neuropsychological evaluation. (Appendix at pp. 0117.)

On March 18, 2021, Dr. Lultschik dismissed E.B. from her care because he became verbally aggressive with her during his appointment. At the time of that appointment, Dr. Lultschik advised the claimant to locate a new treating physician and noted that further treatment orders would come from E.B.'s new provider. (Appendix at pp. 0134.)

The claimant followed up with the WVU ENT Clinic regarding his facial injuries. Natalie Kovatch, PA-C, noted with regard to the claimant's facial fractures that there was "nothing further to do[.]" She recommended that the claimant follow up in six months. (Appendix at pp. 0195.)

Eric Fishman, Ph.D., a neuropsychologist, performed a full evaluation of the claimant on March 19, 2021. Dr. Fishman documented a high rate of validity test failure in E.B.'s evaluation. Dr. Fishman diagnosed the claimant with malingering. (Appendix at pp. 0140.)

Dr. Cosgrove again evaluated E.B. on May 27, 2021. Dr. Cosgrove noted that a left shoulder MRI study obtained on March 12, 2021, had revealed mild degenerative arthrosis with an intact rotator cuff. He noted full range of motion at the shoulders with no whole person impairment of the left shoulder. Dr. Cosgrove found that the imaging studies of the claimant's lumbar spine showed no condition that he would relate to the compensable injury. He found no

whole person impairment related to the claimant's musculoskeletal conditions. (Appendix at pp. 0156.)

On June 22, 2021, the claimant underwent a functional capacity evaluation at Pro Medical Rehabilitation in Morgantown, West Virginia. Joseph Pennington, DPT, conducted this evaluation. Mr. Pennington noted that "there are serious validity questions with testing, with client showing inconsistency of effort and inappropriate performance indicators per testing protocol[.]" (Appendix at pp. 0199.)

On July 2, 2021, Dr. Moorehead concluded that the claimant "has reached maximal medical improvement" with regard to his traumatic head injuries.

By order dated July 9, 2021, the claim administrator closed this claim for the payment of temporary total disability benefits.

The claimant then underwent a psychiatric evaluation with Dr. Ivan L. Mazzorana, Jr. on December 1, 2021. Dr. Mazzorana is a board-certified psychiatrist practicing in Tampa, Florida. He is the only psychiatrist to have evaluated the claimant and performed all testing required under Rule 20 for psychiatric diagnosis and impairment. Dr. Mazzorana reviewed the claimant's medical records and psychological testing, and he performed an in-person evaluation of the claimant. Based on this evaluation process, Dr. Mazzorana diagnosed the claimant with (1) adjustment disorder, (2) malingering, and (3) possible post-concussive syndrome. Dr. Mazzorana specifically excluded the diagnosis of post-traumatic stress disorder, as the claimant did not meet the DSM criteria for such a diagnosis. Dr. Mazzorana found the claimant to have 0% whole person impairment related to his psychiatric conditions. (Appendix at pp. 0231.)

The claimant then underwent a medical evaluation with Dr. Michael Rosenberg at the request of his legal counsel on December 10, 2021. Dr. Rosenberg reports to be an internist. E.B. reported to Dr. Rosenberg that he has "persistent fractures of the right cheek" that might necessitate further surgery. E.B. reported his household activities to be cleaning counters and tables and doing "very light laundry." He reported that he could not shop because of PTSD. It

does not appear that Dr. Rosenberg reviewed the reports from Dr. Cosgrove, Dr. Fishman, or Mr. Pennington in preparing his report. Dr. Rosenberg diagnosed the claimant with back pain, post-concussion syndrome, status post facial fractures, and post-traumatic stress disorder. (Appendix at pp. 0055.)

On March 1, 2022, Franklin Curry, Psy.D., completed a claim reopening application on behalf of E.B.. Dr. Curry is a psychologist. E.B. participates in telephonic psychotherapy sessions with Dr. Curry. Dr. Curry requested that E.B.'s claim be reopened for temporary total disability benefits based upon E.B.'s diagnoses of post-traumatic stress disorder and major depressive disorder.

By order dated March 23, 2022, the claim administrator denied the claimant's request to recognize post-traumatic stress disorder and major depressive disorder as compensable components of this claim. The order noted that the claimant's request for coverage of these conditions was not supported by medical evidence required under the West Virginia Workers' Compensation Act. Nonetheless, the claimant protested this order.

In support of his protest, the claimant offered several notes and letters from his treating therapists, Dr. Curry and Jillian Conrad, APRN. While Dr. Curry and Nurse Conrad are authorized to treat E.B. through the workers' compensation system, neither are permitted to diagnose or rate his psychiatric conditions under Rule 20 and *Hale v W. Va. Offices of the Insurance Commissioner*, 228 W. Va. 781, 724 S.E.2d 752 (2012). Likewise, E.B. submitted reports from Kenneth A. Visser, Ph.D., and Patricia M. Bailey, Ph.D. These reports also purport to diagnose and rate the claimant with various psychiatric conditions. Again, neither Dr. Visser nor Dr. Bailey are authorized to diagnose or rate psychiatric conditions under W. VA. C.S.R. § 85-20-12.4 and *Hale*. E.B. also submitted reports from Dr. Matthew S. Zell and Dr. J. David Lynch finding him to be disabled by his psychiatric conditions. Dr. Lynch is an orthopedic surgeon. Dr. Zell appears to be a resident physician at WVU Hospitals, but there is no indication that he holds board certification in psychiatry, and he produced no records indicating that he has performed the battery of testing required by Rule 20 to make any psychiatric diagnosis in this



claim. The totality of E.B.'s evidence reports that he is unable to engage in activities of daily living outside of his home. His home activities are limited to light cleaning chores. He is unable to travel outside of his home for simple errands like shopping and driving.

In response to E.B.'s evidence, the employer submitted video surveillance and written surveillance reports of E.B.'s activities at various times in 2021. Contrary to E.B.'s reports, he appears to be quite active outside his home. He drives regularly to pick up his children from school. He performs errands with his wife. He moves furniture—even large furniture—without assistance. He drives to homesites and uses posthole diggers to set real estate signs for his wife's business. And he regularly goes grocery shopping. Based upon the surveillance videos and reports, it appears that E.B. is far more active in his lifestyle than has been reported to Dr. Curry, Nurse Conrad, Dr. Rosenberg, Dr. Visser, Dr. Bailey, or Dr. Lynch. (Appendix at pp. 0209.)

By decision dated November 2, 2022, the Workers' Compensation Board of Review affirmed the four protested orders. The claimant appealed that decision to the Intermediate Court of Appeals. The Intermediate Court of Appeals affirmed the decision of the Workers' Compensation Board of Review by memorandum decision dated June 7, 2023. (Appendix at pp. 0331.)

### SUMMARY OF ARGUMENT

The West Virginia Workers' Compensation Act sets forth specific criteria that must be met for recognition of compensable psychiatric conditions. Specific testing must be conducted under supervision of a psychiatrist for such conditions to be recognized as compensable components of a claim. None of these conditions were met under this claim. The claimant provided none of the requisite evidence to establish the compensability of post-traumatic stress disorder under this claim. The Workers' Compensation Board of Review properly affirmed the denial of recognition of that condition, as well as any treatment or benefits related to that condition. In turn, the Intermediate Court of Appeals properly affirmed the conclusions of the Workers' Compensation Board of Review.

STATEMENT REGARDING ORAL ARGUMENT

The Respondent, Alliance Coal, LLC, does not believe that oral argument would enhance the Intermediate Court of Appeals' understanding of the issues presented in this appeal.

## ARGUMENT

### **A.     The claimant has failed to establish that the Intermediate Court of Appeals committed reversible error in the underlying order.**

Statutory law gives significant deference to orders that are affirmed by the Workers' Compensation Board of Review. W. VA. CODE § 23-5-15(d) states the applicable standard of review when such an appeal is made to the Supreme Court of Appeals:

If the decision of the board represents an affirmation of a prior ruling by both the commission and the Office of Judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the supreme court of appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

Upon passage of the Appellate Reorganization Act, the Workers' Compensation Board of Review supplanted the Office of Judges as the initial trier of fact in workers' compensation litigation. The newly created Intermediate Court of Appeals assumed jurisdiction for appeals from the Board of Review. Although not specifically addressed in the legislation which reorganized the structure of the appellate courts in workers' compensation litigation, there is nothing to indicate that the legislature intended to alter the standard of review stated in W. VA. CODE § 23-5-15(d), nor has the Court promulgated any Rule to indicate any such change. Moreover, the statutory expression of the Court's standard of review is consistent with the Court's own holding regarding the proper appellate review of the lower workers' compensation courts' decisions. Questions of law in workers' compensation appeals have consistently been reviewed on a *de novo* basis. *See, e.g., Justice v. W. Va. Office of Ins. Comm'n*, 230 W. Va. 80,

736 S.E.2d 80 (2012). However, where it comes to the lower courts' findings of fact in workers' compensation appeals, the Court has reversed only if there was a plain error, and "the plainly wrong standard of review is a deferential one, which presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." Syl. pt 3, *In re: Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996); *Frymier-Halloran v. Paige*, 193 W. Va. 687, 458 S.E.2d 780 (1995); *Conley v. Workers' Comp. Div.*, 199 W. Va. 196, 483 S.E. 2d 542 (1997).

Accordingly, the underlying order of the Intermediate Court of Appeals should be affirmed.

**B. The claimant failed to meet any of the statutory or regulatory requirements to add a compensable psychiatric condition to this workers' compensation claim.**

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For purposes of occupational injury, W. VA. CODE § 23-4-1 states that a claim administrator "shall disburse the workers' compensation fund to the employees of employers subject to this chapter who have received personal injuries *in the course of and resulting from their covered employment.*" (Emphasis added). In order for a claim to be compensable under the Workers' Compensation Act, three elements must coexist: (1) a personal injury, (2) received in the course of employment, and (3) resulting from that employment. *Barnett v. State Workmens' Comp. Comm'r*, 153 W. Va. 796, 172 S.E.2d 698 (1970). All three elements must exist to establish a compensable claim. *Sansom v. Workers' Compensation Comm'r*, 176 W. Va. 545, 346 S.E.2d 63 (1986).

With regard to psychiatric conditions, particular diagnostic steps are required to justify the addition of compensable conditions to a claim. W. VA. C.S.R. § 85-20-12, as interpreted by *Hale v W. Va. Offices of the Insurance Comm'r*, 228 W. Va. 781, 724 S.E.2d 752 (2012), sets forth specific parameters for the diagnosis, treatment, and evaluation of psychiatric

conditions. E.B. has not obtained any evidence from any provider qualified under the regulation to make such a diagnosis or statement as to compensability of his condition other than Dr. Mazzorana. As Dr. Mazzorana is the only qualified physician to evaluate E.B. within the specified testing requirements, his opinion must be the determinant of the compensability question. Dr. Mazzorana identified (1) adjustment disorder, (2) malingering, and (3) possible post-concussive syndrome as the claimant's active psychiatric diagnoses. The claim administrator properly relied on his opinion to rule on the compensability of the claimant's psychiatric conditions.

The only reliable medical opinion on record as to E.B.'s psychiatric diagnoses and their relationship to this claim is that of Dr. Mazzorana.<sup>1</sup> The claim administrator acted upon Dr. Mazzorana's opinion in ruling claims to be compensable and excluding the request to recognize post-traumatic stress disorder and major depressive disorder. In light of the governing statutes and relevant medical evidence, the denial of PTSD as a compensable condition in this claim was proper.

**C. As post-traumatic stress disorder is not a compensable condition under this workers' compensation claim, it cannot form the basis of an award of temporary total disability benefits or medical benefits.**

The claimant based requests for both temporary total disability benefits and authorization of medications on his diagnosis of post-traumatic stress disorder (PTSD). As PTSD was denied as a compensable component of this claim, it cannot form the basis to make

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<sup>1</sup> Counsel for the employer must acknowledge that the claimant attempts to use an email communication with claimant's counsel as evidence in this matter. While counsel for the employer admits expressing concern for E.B.'s well-being in light of reported thoughts of self-harm, counsel for the employer further admits that he has no training or expertise in mental health issues. Much like Dr. Curry, Dr. Bailey, or Dr. Lynch, the opinions of employer's counsel are not entitled to any weight in the compensability of a psychiatric condition under the Workers' Compensation Act.

such awards of benefits. The Administrative Law Judge committed no error in affirming the denial of these benefits on the basis that PTSD is not compensable under this claim.

### CONCLUSION

Based upon the foregoing, the employer respectfully requests that this Court affirm the underlying decision of the Administrative Law Judge.

/s/ James W. Heslep  
James W. Heslep (W. Va. Bar No. 9671)

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CERTIFICATE OF SERVICE

I hereby certify that on the 26<sup>th</sup> day of July, 2023, I served the foregoing “Brief of Respondent” upon all counsel of record through File and Serve Xpress:

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