INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FILED
December 23, 2024
ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

ICG BECKLEY, LLC,
Employer Below, Petitioner

v.) No. 24-ICA-300 (JCN: 2022002109)

ARTHUR DAVIS,
Claimant Below, Respondent

MEMORANDUM DECISION

Petitioner ICG Beckley, LLC ("ICG") appeals the June 25, 2024, order of the Workers' Compensation Board of Review ("Board") reversing multiple orders of the claim administrator. Respondent Arthur Davis filed a timely response.[1] ICG did not file a reply.

The issues on appeal are whether the Board erred in reversing the following claim administrative orders: 1) the order dated June 8, 2023, denying authorization for transforaminal epidural injections on the right at L5-S1; 2) the order dated June 15, 2023, that also denied authorization for transforaminal epidural injections on the right at L5-S1; and 3) the order dated July 26, 2023, that denied authorization for anterior lumbar spinal fusion at L5-S1, anterior instrumentation at L5-S1, application of prosthetic device at L5-S1, allograft, posterior lumbar spinal fusion at L5-S1, laminotomy/laminectomy at L5-S1, and posterior instrumentation at L5-S1.

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.

Mr. Davis, a scoop operator for ICG, injured his low back on July 23, 2021, when he ran over a large rock while operating a piece of equipment. By order dated August 10, 2021, the claim administrator held the claim compensable for sprain of ligaments of the lumbar spine.

[1] ICG is represented by Jeffrey B. Brannon, Esq. Mr. Davis is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq.

An MRI on August 19, 2021, revealed a broad-based posterior protrusion at L5-S1 along with osteophytes and ligamentous thickening that resulted in moderate bilateral neural foraminal stenosis.

On January 25, 2022, Prasadarao Mukkamala, M.D., examined Mr. Davis for a lumbar sprain (the only compensable condition in the claim at the time). Dr. Mukkamala determined that the lumbar disc herniation/disc protrusion and disc desiccation seen on the MRI represented preexisting and degenerative spondyloarthropathy and did not result from the injury. According to Dr. Mukkamala, Mr. Davis did not experience back pain until the injury. Dr. Mukkamala opined that there was no indication for surgery or epidural injections to treat the compensable injury, although he admitted that Mr. Davis' degenerative spondyloarthropathy could benefit from such treatment. Finding Mr. Davis was at maximum medical improvement ("MMI"), Dr. Mukkamala assessed a total of eight percent whole person impairment ("WPI") of the lumbar spine, but apportioned five percent WPI to noncompensable conditions and three percent WPI for the compensable injury.

In a letter dated July 28, 2022, Rajesh V. Patel, M.D., an orthopedic spine surgeon, noted that Mr. Davis developed low back pain with right leg numbness and weakness after the work injury. Further, Dr. Patel commented that a lumbar MRI revealed a disc protrusion at L5-S1 with S1 nerve root impingement with a minimal amount of desiccation, but showed the L4-L5 disc was well preserved. Dr. Patel correlated Mr. Davis' clinical symptoms with the MRI findings, and said that the symptoms were consistent with an acute L5-S1 disc protrusion and radiculopathy. Dr. Patel observed that Mr. Davis performed heavy work without difficulty and did not seek treatment for low back problems until the work injury. Thus, Dr. Patel opined that the disc protrusion and radiculopathy resulted from the work injury. Alternatively, Dr. Patel asserted that if the L5-S1 disc protrusion was preexisting, the work injury caused the active radiculopathy on the right side. Thus, Dr. Patel opined that in either scenario, the diagnoses of S1 radiculopathy and L5-S1 disc protrusion should be ruled compensable. Further, he asserted that epidural injections, physical therapy, and possibly surgery should be covered in the claim.

Previous litigation resulted in the Board's issuance of an order dated November 23, 2022, that held radiculopathy of the lumbosacral region to be a compensable condition in the claim, but affirmed the claim administrator's rejection of lumbosacral protrusion/herniation as a compensable condition. In that order, the Board also ruled that transforaminal epidural injections at L5-S1 (and other treatments) were medically related and reasonably required for the compensable injury. In *ICG Beckley, LLC v. Davis*, No. 22-ICA-326, 2023 WL 3172059 (W. Va. Ct. App. May 1, 2023) (memorandum decision), this Court affirmed the Board's order.

On February 13, 2023, Dr. Patel examined Mr. Davis and commented that a previous epidural injection provided some temporary relief of symptoms in his leg, but he

was now experiencing moderate back pain. Dr. Patel offered a repeat injection as an option, but noted that since Mr. Davis continued to have pain from the herniated disc and radiculopathy, the other option was surgical intervention. Dr. Patel ordered a new MRI and x-rays to help decide about surgery. The lumbar MRI performed on March 15, 2023, again revealed a broad-based posterior disc protrusion at L5-S1 and showed that it was slightly greater to the right of midline. Marginal osteophytes and facet hypertrophy resulting in moderate bilateral neural foraminal stenosis, unchanged from the prior exam, were also noted. Dr. Patel reviewed the MRI when he examined Mr. Davis on March 27, 2023. Treatment options were discussed and Dr. Patel offered a second epidural injection to see if it would provide incremental relief and avoid surgery. Alternatively, Dr. Patel offered decompression of the disc at L5-S1 versus decompression and fusion. Dr. Patel explained that he was more inclined to perform a lumbar fusion due to Mr. Davis' groin pain as decompression alone may not provide adequate relief.

At a follow-up appointment with Dr. Patel on May 31, 2023, Mr. Davis reported that he had good relief for a couple of weeks following the last injection, but the pain had returned. Another epidural injection was offered to provide incremental relief and Dr. Patel also discussed again the two surgical procedures. Mr. Davis opted to have a third epidural injection.

A medical review was performed on June 8, 2023, by Roy Braid, M.D., a board certified anesthesiologist. Dr. Braid reviewed the claim to determine the medical necessity for a right transforaminal epidural injection at L5-S1, a lumbar caudal epidural injection, and bilateral medial branch nerve blocks at L3-L4, L4-L5, and L5-S1. In his analysis, Dr. Braid referenced the Official Disability Guidelines ("ODG"). Dr. Braid determined that another transforaminal injection was not appropriate or medically necessary because the previous injections failed to provide sufficient relief. Similarly, Dr. Braid did not find a caudal epidural right L5-S1 injection was appropriate or medically necessary since the lumbar epidural injection was not sufficiently effective. However, Dr. Braid noted that the ODG recommended epidural steroid injections as short-term treatment for radiculopathy that is corroborated by imaging or other diagnostic tests and that repeat injections should only be provided if a prior one produced 50% to 70% pain relief for six to eight weeks. Finally, Dr. Braid did not feel that bilateral medial branch blocks were appropriate or medically necessary as the ODG did not recommend this treatment for patients with radicular pain, spinal stenosis, or when surgery was anticipated.

By order dated June 8, 2023, the claim administrator denied Dr. Patel's request for transforaminal epidural right L5-S1 injections based on the physician advisor's determination dated June 8, 2023. Mr. Davis protested this order to the Board.

On June 13, 2023, Michael P. Rubinstein, M.D., board certified in orthopedic surgery with a subspecialty in surgery of the hand, performed a second physician review at the request of the claim administrator regarding the medical necessity of either a

transforaminal epidural right L5-S1 injection or a right S1 transforaminal injection. Following his review of the records, Dr. Rubinstein determined that a third epidural injection was not medically necessary or appropriate because the prior two injections did not provide significant improvement in symptoms. Based on the same reasoning, he also determined that a request for a transforaminal epidural right S1 was not medically necessary or appropriate. Dr. Rubinstein based his opinions on the California Medical Treatment Utilization Schedule ("MTUS") effective date November 23, 2021.

By order dated June 15, 2023, the claim administrator denied authorization for a transforaminal epidural right L5-S1 and a transforaminal epidural right S1 based upon a physician advisor review dated June 15, 2023, finding the requested service did not meet established treatment standards of medical necessity. Mr. Davis protested this order to the Board.

On July 6, 2023, Dr. Patel saw Mr. Davis who reported continued back and leg pain. Since conservative treatment was not working, Dr. Patel recommended lumbar fusion surgery as he felt it would provide better long term relief and stability than decompression alone. Dr. Patel agreed with the physician reviewers who did not recommend injections as he did not believe they would likely succeed. Dr. Patel requested authorization for the fusion surgery and listed the diagnosis codes for the following conditions: other intervertebral disc displacement, lumbosacral region; other specified deforming dorsopathies, lumbosacral region; and radiculopathy, lumbosacral region. By order dated July 26, 2023, the claim administrator denied authorization for the lumbar fusion surgery as the diagnosis codes for the request were not found to be compensable. Mr. Davis protested this order to the Board.

Dr. Patel authored a letter dated October 2, 2023, in which he explained that Mr. Davis had clinical signs of right S1 radiculopathy as well as back pain on the right. He noted that these signs were consistent with the MRI findings and he noted that except for the L5-S1 disc, the other discs were well preserved. This, he felt, more likely indicated an acute process at that level than a degenerative process. Dr. Patel contended that surgery could be delayed if another epidural injection were given, but the only other option was surgery to address the L5-S1 disc protrusion as well as the right S1 radiculopathy – both of which he felt were related to the injury. Dr. Patel explained that addressing the radiculopathy through decompression and fusion would offer the best chance at being maintained given Mr. Davis' high disc height and physiology.

On June 25, 2024, the Board issued an order reversing the claim administrator's orders that denied transforaminal epidural right L5-S1 injections and lumbar fusion surgery at L5-S1. At the beginning of its analysis, the Board pointed out that radiculopathy of the lumbosacral region had been added as a compensable condition in the claim in November of 2022. Next, the Board noted that Dr. Patel had treated Mr. Davis since October of 2021 while Drs. Braid and Rubenstein had not physically examined Mr. Davis and determined

that Mr. Davis had not experienced 50% - 70% pain relief for six to eight weeks. Further, the Board found that Dr. Patel requested authorization for the injections to treat the L5-S1 disc protrusion as well as the compensable right S1 radiculopathy. The Board found Dr. Patel's findings to be persuasive and that repeat injections are medically related and reasonably required medical treatment for the compensable injury.

Turning to the issue of whether fusion surgery should have been authorized, the Board again noted that radiculopathy of the lumbosacral region was a compensable condition in the claim. The Board observed that the claim administrator's basis for denying the surgery was that the diagnosis codes listed in Dr. Patel's authorization request were not compensable. However, the Board pointed out that Dr. Patel's request for fusion surgery included the diagnosis code for radiculopathy of the lumbosacral region. The Board determined that Dr. Patel's opinion was persuasive and thus found that the surgery was medically related and reasonably required treatment for the compensable injury if the additional L5-S1 epidural injections failed to provide adequate relief. It is from the Board's order that ICG 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:
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> (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*, 250 W. Va. 510, 905 S.E.2d 528 (2024).

On appeal, ICG argues that the Board was clearly wrong in reversing the claim administrator's orders and authorizing the treatment. ICG contends that the treatment was requested to address the noncompensable L5-S1 disc protrusion, other intervertebral disc displacement, and other specified deforming dorsopathies. Further, ICG asserts that the Board erroneously used the fact that the peer reviewers did not examine Mr. Davis as its

justification for finding that the injections should be authorized. ICG also contends that the Board failed to acknowledge that Drs. Braid and Rubinstein determined that since the prior epidural steroid injections did not provide long-term relief, additional injections were not reasonable and necessary.

Next, ICG argues that the Board erred in relying on Dr. Patel's opinion that the proposed surgery was medically related and reasonably required medical treatment for the compensable injury. In particular, ICG points to Dr. Patel's letter dated October 2, 2023, in which he commented that the proposed surgery was to address the L5-S1 disc protrusion and the right S1 radiculopathy, which he felt were compensable. ICG argues that Dr. Patel did not understand or was unaware of the compensable conditions in the claim and thus, the Board erroneously relied on his opinion. Further, ICG contends that since Dr. Patel opined that the surgery for radiculopathy would require decompression, and yet he requested decompression and fusion surgeries, the fusion was requested to treat the noncompensable lumbar disc protrusion. Thus, the Board was clearly wrong in finding Dr. Patel's opinion to be more persuasive. We disagree.

As previously mentioned, radiculopathy is a compensable condition in the claim, however, lumbosacral protrusion/herniation is not. Dr. Patel requested authorization for the following treatment: transforaminal epidural right L5-S1 injections; and anterior lumbar spinal fusion L5-S1, anterior instrumentation L5-S1, application of prosthetic device L5-S1, allograft, posterior lumbar spinal fusion L5-S1, laminotomy/laminectomy L5-S1, and posterior instrumentation L5-S1. In reviewing the issue of whether additional epidural injections should be authorized, the Board considered the peer review reports by Drs. Braid and Rubinstein, along with Dr. Patel's report dated October 2, 2023. The Board noted that neither of the peer reviewer physicians examined Mr. Davis, but that Dr. Patel had treated him since October of 2021. The Board determined that Dr. Patel's findings were persuasive and found that repeat injections are medically related and reasonably required medical treatment. Although ICG argues that the Board failed to acknowledge the purpose of a peer review, we find that the Board properly weighed the evidence and concluded that Dr. Patel's findings were persuasive and implied that the findings by Drs. Braid and Rubinstein were either less persuasive or not persuasive. We find no error in the Board's decision and defer to its credibility determination. *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. . . .").

After review, we also conclude that the Board was not clearly wrong in concluding that the requested surgery was medically related and reasonably required treatment for a compensable diagnosis in the claim. The sole basis stated by the claim administrator for denying authorization for the surgery was that none of the diagnosis codes listed in Dr. Patel's authorization request were compensable. However, as the Board observed, the claim administrator is incorrect because Dr. Patel referenced radiculopathy of the

lumbosacral region in his request. Further, Dr. Patel's findings, which the Board found to be persuasive, explained why he recommended fusion surgery as opposed to decompression alone. We defer to the Board's credibility determination and also note that neither Dr. Braid nor Dr. Rubinstein addressed the medical necessity of the surgery requested by Dr. Patel.

Finding no error in the Board's June 25, 2024, order, we affirm.

Affirmed.

ISSUED: December 23, 2024

CONCURRED IN BY:

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