

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

LISA R. RHODES,
Claimant Below, Petitioner

v.) No. 24-ICA-301 (JCN: 2022004339)

GO-MART, INC.,
Employer Below, Respondent

FILED
February 28, 2025

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

MEMORANDUM DECISION

Petitioner Lisa R. Rhodes appeals the June 27, 2024, order of the Workers' Compensation Board of Review ("Board"). Respondent Go-Mart, Inc. ("GM") filed a response.¹ Ms. Rhodes did not reply. The issue on appeal is whether the Board erred in affirming the claim administrator's order, which closed the claim for temporary total disability ("TTD") benefits.

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 August 31, 2021, while employed by Go-Mart, Ms. Rhodes felt a pop in her back while she was moving items through the store. The Board indicated that the claim was held compensable for lumbar sprain. Ms. Rhodes had an extensive history of back pain, and she had received treatment for back pain since at least 2014. In 2019, Ms. Rhodes complained of pain radiating down her legs. An MRI of Ms. Rhodes' lower back was performed on April 21, 2020, revealing L4-L5 bilateral neural foraminal small disc herniations, greater on the left; L4-L5 central canal stenosis due to facet joint hypertrophy; degenerative disc disease at L5-S1; and severe facet joint disease at L5-S1, worse on the right. In November 2020, Ms. Rhodes was diagnosed with both multilevel degenerative lumbar disc disease and lumbar radiculopathy; physical therapy was recommended.

Christina Gillenwater, M.D., has treated Ms. Rhodes since 2016 for leg pain, hip pain, and back pain. On January 7, 2021, Dr. Gillenwater indicated that Ms. Rhodes had

¹ Ms. Rhodes is represented by Patrick K. Maroney, Esq. GM is represented by James W. Heslep, Esq., and Steven K. Wellman, Esq.

been scheduled for a spinal injection, but that was canceled due to COVID-19. On January 14, 2021, an EMG was performed on Ms. Rhodes, revealing lumbar radiculopathy at L5 or S1. On July 9, 2021, Ms. Rhodes reported to Dr. Gillenwater that her back hurt so much that she was considering retiring and she stated that she takes Ibuprofen every day.

Ms. Rhodes was seen by Richard G. Bowman, M.D., from January 2021 to August 2021. She reported back pain that radiated down her legs. Dr. Bowman diagnosed Ms. Rhodes with lumbar radiculopathy. On March 30, 2021, Dr. Bowman performed a transforaminal epidural steroid injection on Ms. Rhodes. She reported that her pain continued after the injection.

On September 21, 2021, following the compensable injury, Ms. Rhodes underwent a second MRI of her lower back, revealing severe central canal stenosis at L4-L5, with severe left exit foraminal narrowing and moderate right exit foraminal narrowing at that level; foraminal extension of protrusion touched the L4 nerve root sleeves bilaterally, worse on the right, correlating with right L4 radiculopathy; a mass effect upon the right S1 nerve root sleeve, due to an enlarged right L5-S1 facet; right lower extremity S1 radiculopathy; and severe degenerative endplate changes at L5-S1. Ms. Rhodes underwent physical therapy from October 15, 2021, to December 2, 2021. She indicated that the physical therapy made her symptoms worse.

Rebecca Thaxton, M.D., issued a report dated November 2, 2021, after performing a medical record review. Dr. Thaxton opined that Ms. Rhodes' symptoms pre-dated the claim and noted that, prior to the work injury, she underwent transforaminal epidural steroid injections in March 2021.

On December 2, 2021, Bruce Guberman, M.D., performed an independent medical evaluation ("IME") of Ms. Rhodes. Ms. Rhodes reported constant pain in the lumbar region with radiation into the right hip, right leg, and right foot. It was reported that Ms. Rhodes had not worked since the date of the compensable injury. The assessment was chronic posttraumatic musculoskeletal strain of the lumbar spine due to an occupational injury. Dr. Guberman opined that the conditions of aggravation and exacerbation of degenerative joint and disc disease of the lumbosacral spine with right-sided radiculopathy should be added to the claim as compensable. However, Dr. Guberman found that regarding the only allowable compensable diagnosis of low back strain, Ms. Rhodes had reached MMI. Dr. Guberman opined that regarding the other diagnosis of aggravation and exacerbation of degenerative joint and disc disease with right-sided radiculopathy, Ms. Rhodes had not yet reached MMI. Dr. Guberman further determined that Ms. Rhodes was not currently able to return to work.

Dr. Gillenwater submitted a Diagnosis Update form dated January 13, 2022, requesting that lumbar radiculopathy and degeneration of lumbar intervertebral disc be

added to the claim as compensable conditions. James Dauphin, M.D., performed a medical records review and issued a report dated February 23, 2022. Dr. Dauphin opined that lumbar radiculopathy and degenerative disc disease preexisted the compensable injury. Dr. Dauphin found no indication that the compensable injury aggravated or worsened the preexisting condition as Ms. Rhodes' symptoms prior to the compensable injury and after were similar.²

Ms. Rhodes was seen by Scott Rainey, D.O., who issued a report dated April 12, 2022. Dr. Rainey opined that Ms. Rhodes suffered a lower back sprain as a result of the compensable injury. Dr. Rainey noted that Ms. Rhodes' documented symptoms following the compensable injury were similar to her symptoms prior to the compensable injury. Dr. Rainey also noted that the results of the imaging studies performed after the injury were similar to those of the imaging studies prior to the injury, as both revealed severe degenerative changes and spinal stenosis. Dr. Rainey opined that there was no evidence of material change, structural damage, or alteration to Ms. Rhodes' lumbar spine occurring as a result of her August 31, 2021, work injury. Dr. Rainey further opined that Ms. Rhodes was at MMI for the compensable injury.

On January 18, 2023, Ms. Rhodes was deposed, and she testified that the injury sustained on August 31, 2021, was something beyond a sprain/strain. Ms. Rhodes further testified that her pre-existing back condition did not start with a "pop" but instead just started hurting. Ms. Rhodes indicated that she was able to continue working up to August 31, 2021, despite her pre-existing back condition. Ms. Rhodes testified that her post-compensable injury pain was more severe than the pre-existing back pain. Ms. Rhodes testified that after August 31, 2021, the pain went down to her toes whereas, prior to the injury the pain did not go to her toes. Also, she said that now the pain was constant. Ms. Rhodes testified that she attempted to return to work as a cashier in December of 2021, for two- or three-weeks, but couldn't continue with the work and had not worked since.

On January 23, 2023, the claim administrator issued an order closing the claim for TTD based on Dr. Rainey's report. Ms. Rhodes protested this order. On June 27, 2023, the Board issued an order affirming the claim administrator's order closing the claim for TTD benefits. The Board found that Ms. Rhodes failed to establish that she continued to be temporarily and totally disabled. Ms. Rhodes now appeals the Board's order.

² The claim administrator issued an order dated April 6, 2022, denying the addition of lumbar radiculopathy and degeneration of lumbar intervertebral disc as compensable conditions in the claim. On June 6, 2023, the Board affirmed the claim administrator's order. This Court issued a memorandum decision dated November 1, 2023, which affirmed the Board. *See Rhodes v. Go-Mart, Inc.*, No. 23-ICA-279, 2023 WL 7203424 (W. Va. Ct. App. Nov. 1, 2023.)

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*, 250 W. Va. 510, 905 S.E.2d 528 (2024).

Ms. Rhodes argues that she was not at MMI, and she should have been granted additional TTD benefits.³ We disagree.

If a claimant is released to return to work, returned to work, or is placed at MMI, he or she is no longer entitled to TTD benefits. *See* W. Va. Code § 23-4-7a (2005). Here, the Board determined that Ms. Rhodes submitted no reliable medical evidence refuting Dr. Rainey's finding of MMI from the compensable injury. The Board further found that the medical evidence establishes that Ms. Rhodes is at MMI from the compensable injury. The Board noted that although Dr. Guberman found that Ms. Rhodes was not at MMI for the noncompensable diagnoses of aggravation and exacerbation of degenerative joint and disc disease with right-sided radiculopathy, he stated that Ms. Rhodes was otherwise at MMI for the compensable injury.

³ Ms. Rhodes further argues that Dr. Rainey did not consider whether she was at MMI for lumbar radiculopathy, which she seemed to allege was a compensable condition in this claim. However, this Court previously determined that lumbar radiculopathy and degenerative lumbar disc disease were not compensable conditions in this claim. *See Rhodes v. Go-Mart, Inc.*, No. 23-ICA-279, 2023 WL 7203424 (W. Va. Ct. App. Nov. 1, 2023.) Thus, this argument is found to be without merit.

Upon review, we conclude that the Board was not clearly wrong in finding that Ms. Rhodes failed to establish that she continued to be temporarily and totally disabled after Dr. Rainey found her to be at MMI for the compensable injury. Thus, we cannot conclude that the Board was clearly wrong in affirming the claim administrator's order closing the claim for TTD benefits.

Accordingly, we affirm the Board's June 27, 2024, order.

Affirmed.

ISSUED: February 28, 2025

CONCURRED IN BY:

Chief Judge Charles O. Lorensen
Judge Daniel W. Greear
Judge S. Ryan White