

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**BARBARA WILSON-MISHOW,
Claimant Below, Petitioner**

v.) No. 24-ICA-305 (JCN: 2021024439)

**MINERAL COUNTY BOARD OF EDUCATION,
Employer Below, Respondent**

**FILED
February 28, 2025**

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

MEMORANDUM DECISION

Petitioner Barbara Wilson-Mishow appeals the July 1, 2024, order of the Workers' Compensation Board of Review ("Board"). Respondent Mineral County Board of Education ("Mineral BOE") timely filed a response.¹ Ms. Wilson-Mishow did not reply. The issue on appeal is whether the Board erred in affirming three of the claim administrator's orders, which: denied authorization for an MR arthrogram; denied authorization for a right shoulder arthroscopy and extensive debridement, open biceps tenodesis, and rotator cuff repair; and denied bicep tendonitis/tear as a compensable injury in the claim.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2022). 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.

Ms. Wilson-Mishow was employed as a cafeteria manager by Mineral BOE. On June 2, 2021, Ms. Wilson-Mishow indicated that she was doing inventory of food materials and placed a forty-pound box on a shelf. Ms. Wilson-Mishow reported that she felt a pull in her right arm, specifically in her right shoulder and biceps.²

A July 12, 2021, MRI of Ms. Wilson-Mishow's right shoulder had the impression of a full-thickness retracted tear of the superior bundle of the subscapularis tendon with

¹ Ms. Wilson-Mishow is represented by Thomas D. Hall, Esq. Mineral BOE is represented by James W. Heslep, Esq., and Steven K. Wellman, Esq.

² The Report of Occupational Injury or Disease form is not included as part of the record on appeal.

associated medial dislocation of the long head biceps tendon and a signal abnormality likely representing a partial tear and underlying tendinopathy. Jong Kim, M.D., reviewed the MRI and indicated that he did not see any evidence of a full-thickness retracted tear of the long head biceps tendon.

By order dated June 15, 2021, the claim administrator held the claim compensable for right shoulder strain.

On December 17, 2021, Ms. Wilson-Mishow underwent a right shoulder diagnostic arthroscopy and open rotator cuff repair performed by Matthew Thompson, M.D. Dr. Thompson noted that the biceps was in its groove and not dislocated into the subscapularis tear. Nothing further was mentioned about the biceps tendon. The pre-operative and postoperative diagnoses were right shoulder rotator cuff tear.

On June 8, 2022, Ms. Wilson-Mishow followed up with Dr. Thompson, and indicated that her condition was unchanged. Ms. Wilson-Mishow reported that she had occasional throbbing pain, and that she was using a bone stimulator. Dr. Thompson discussed activity modification with Ms. Wilson-Mishow, gave her a prescription for physical therapy, and indicated that she should remain off work.

On June 15, 2022, D. Kelly Agnew, M.D. performed an independent medical evaluation (“IME”) of Ms. Wilson-Mishow. Dr. Agnew’s impression was that Ms. Wilson-Mishow’s work injury allowed for right shoulder strain, and a history of right subscapularis repair on December 17, 2021, with no biceps pathology identified, and ongoing complaints with a component of nonorganicity. Dr. Agnew took range of motion measurements and found 6% whole person impairment in Ms. Wilson-Mishow’s right shoulder. However, Dr. Agnew expressed concerns about the validity of his measurements because Ms. Wilson-Mishow exhibited greater motion in physical therapy than she did for him; thus, Dr. Agnew advised that he could not confirm an accurate impairment rating. Dr. Agnew noted that Ms. Wilson-Mishow had a subscapularis repair, and that it does not appear that any biceps intervention was needed. Dr. Agnew opined that Ms. Wilson-Mishow was at maximum medical improvement (“MMI”). Further, Dr. Agnew noted that the levels of pain Ms. Wilson-Mishow reported seemed out of proportion to her surgical history, the time which had passed since her surgery, her absence from prescription medications, and the absence of atrophy.

On July 20, 2022, Ms. Wilson-Mishow was seen by Dr. Thompson, and indicated no change in her symptoms. Dr. Thompson stated that he would like for Ms. Wilson-Mishow to have an MR arthrogram to further evaluate her condition because she still had a weak subscapularis and indicated that she should remain off work until after the MR arthrogram.

On August 4, 2022, Rebecca Thaxton, M.D., performed a physician review, in which she considered Dr. Thompson's request for an MR arthrogram of the right shoulder. Dr. Thaxton noted that Ms. Wilson-Mishow's subscapularis was torn as a result of the occupational injury and that the tear was repaired. Dr. Thaxton also noted that Ms. Wilson-Mishow's supraspinatus strength was near normal on July 20, 2022. Dr. Thaxton concluded that tendinopathy and degenerative shoulder disease were demonstrated in Ms. Wilson-Mishow's shoulder since the initial MRI in 2021, and thus were not necessarily directly caused by the work injury.

By grievable order dated September 9, 2022, the claim administrator denied Dr. Thompson's request for an MR arthrogram of the right shoulder based on Dr. Thaxton's report. The claim administrator concluded that new MRI findings would not be causally related to the compensable injury, that Ms. Wilson-Mishow had reached MMI, and that she had exceeded treatment guidelines for the claim. Ms. Wilson-Mishow filed a grievance of this order.

On September 14, 2022, an MRI arthrogram of Ms. Wilson-Mishow's right shoulder revealed an intact tenodesis of the subscapularis, but a partially torn long head of the biceps tendon, dislocated medially through the tear of the superior glenohumeral ligament into the subscapularis tendon. The imaging was compared to the prior MRI performed on July 12, 2021.

In an October 5, 2022, physician review, Randall Short, D.O., considered the medical necessity of a right shoulder arthroscopy with debridement, open biceps tenodesis, and rotator cuff repair. Dr. Short noted that the approved diagnosis in the claim is a right shoulder and arm strain of unspecified muscle, fascia, and tendon. Dr. Short agreed that the surgery for the subscapularis tear (rotator cuff) was related to the work injury. However, he concluded that the more recent request for surgery is for conditions unrelated to the compensable injury of June 2, 2021. Dr. Short noted that the diagnostic studies of September 14, 2022, revealed an intact tenodesis on the subscapularis tendon with new findings of a partially torn long head of the biceps tendon, which was dislocated medially through a tear of the superior glenohumeral ligament into the subscapularis tendon, and that the findings on the most recent MRI were not identified at the time of the December 17, 2021, rotator cuff repair.

On October 12, 2022, the Encova Select Grievance Board considered Ms. Wilson-Mishow's request for reconsideration of the denial of an MR arthrogram of the right shoulder dated September 9, 2022. The Encova Select Grievance Board determined that the denial of an MR arthrogram should be affirmed based on Dr. Thaxton's recommendations. By order dated October 12, 2022, the claim administrator denied authorization for an MR arthrogram of the right shoulder in accordance with the Encova Select Grievance Board's findings. Ms. Wilson-Mishow protested this order to the Board.

By order dated November 16, 2022, the claim administrator denied authorization for a right shoulder arthroscopy and extensive debridement, open biceps tenodesis, and rotator cuff repair based on Dr. Short's physician review.

On January 11, 2023, Dr. Thompson completed a Diagnosis Update, in which he stated that bicep tendonitis/tear and rotator cuff tear should be added as a compensable diagnosis and that right shoulder surgery was necessary to address the new MRI findings.

On February 1, 2023, James Dauphin, M.D., performed a physician review, in which he considered whether the diagnoses of biceps tendinitis/tear and right rotator cuff tear should be added as compensable components of the claim. Dr. Dauphin did not recommend that these conditions be added to the claim, because the addition of these diagnoses would not affect the management of Ms. Wilson-Mishow's condition, as she was at maximum medical improvement and did not require any further treatment. In addition, Dr. Dauphin indicated that Ms. Wilson-Mishow was well beyond the timeframe for a shoulder injury of this nature, and that she is likely suffering from pre-existing degenerative change in the shoulder. Dr. Dauphin also noted that in Dr. Agnew's IME reports he affirmed that Ms. Wilson-Mishow does not need any additional medical treatment and referenced his concerns about her poorly localized diffused pain which is in non-anatomic in nature and not in the correct areas to be caused by biceps tendon or subscapularis.

By order dated March 15, 2023, the claim administrator denied the addition of biceps tendonitis/tear as a compensable condition in the claim based on Dr. Dauphin's report. Ms. Wilson-Mishow protested this order to the Board.

On April 28, 2023, Ms. Wilson-Mishow was seen by Thomas Wise, M.D., for right shoulder pain. Dr. Wise noted that the pain is aggravated by lifting, movement, reaching, and at night. Dr. Wise assessed subluxation of the long head of biceps. Dr. Wise recommended that she proceed with right shoulder arthroscopic surgery which would include biceps tenotomy versus tenodesis with the possibility of the subscapularis tendon repair and a possibility of decompression if necessary. Dr. Wise opined that the surgery needed to be done in order to protect the subscapularis tendon from further damage. On June 8, 2023, Dr. Wise performed a biceps tenodesis vs tenotomy, possible subacromial decompression, and possible shoulder subscapularis tendon repair of the right shoulder. The pre- and post-operative diagnoses were subluxation of tendon of long head of biceps, labral tear, and impingement syndrome.

On June 23, 2023, Ms. Wilson-Mishow followed up with Dr. Wise after her surgery. Dr. Wise noted that she was improving, her incisions were healing well, and her activity level was as expected. Dr. Wise indicated that Ms. Wilson-Mishow should remain off work and continue with physical therapy. On July 26, 2023, Dr. Wise completed a Physician's Report of Work Ability regarding Ms. Wilson-Mishow's right shoulder injury. Dr. Wise

recommended that Ms. Wilson-Mishow remain off work until the next appointment and recommended that she not lift above twenty pounds.

By order dated July 1, 2024, the Board affirmed the claim administrator's orders dated October 12, 2022, November 16, 2022, and March 15, 2023. The Board concluded that the MR arthrogram and right shoulder arthroscopy and extensive debridement, open biceps tenodesis, and rotator cuff repair are not medically related and reasonably required medical treatment for the compensable injury. The Board also concluded that biceps tendonitis/tear should not be added as a compensable condition in the claim. It is from this order that Ms. Wilson-Mishow 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:

- (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, Ms. Wilson-Mishow argues that the Board erred in failing to properly weigh the opinion presented by Dr. Thompson, as he found a connection between the shoulder injury and the bicep injury and determined that a MR arthrogram should be conducted. Further, Ms. Wilson-Mishow argues that the Board did not give proper consideration to Dr. Wise's conclusion that the effects of the injury led to further impairment in her right bicep tendon. Ms. Wilson-Mishow also asserts that the Board erred in denying authorization for the MR Arthrogram and right shoulder arthroscopy and extensive debridement, open biceps tenodesis, and rotator cuff repair. We disagree.

As set forth by the Supreme Court of Appeals of West Virginia, "[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 orders, which denied the addition of biceps tendonitis/tear as a compensable condition in the claim, denied authorization of an MR arthrogram of the right shoulder, and denied authorization for a right shoulder arthroscopy and extensive debridement, open biceps tenodesis, and rotator cuff repair.

Here, the Board found that the opinions of Dr. Dauphin and Dr. Agnew were credible and persuasive with respect to the issue of compensability of biceps tendonitis/tear. The Board noted that Dr. Dauphin stated in his Physician Review report that Ms. Wilson-Mishow was well beyond the time frame for recovery from her shoulder injury. Additionally, Dr. Agnew explained that Ms. Wilson-Mishow's poorly localized diffuse pain was non-anatomic in nature and was not in the correct areas to be caused by the biceps tendon or subscapularis. In contrast, the Board found that the opinions of Dr. Thompson and Dr. Wise were not persuasive. The Board noted that neither Dr. Thompson, who completed a Diagnosis Update on January 11, 2023, nor Dr. Wise, who completed a Diagnosis Update on November 1, 2023, explained their opinions that biceps tendonitis/tear or subluxation is causally related to the compensable injury in light of Ms. Wilson-Mishow's normal biceps findings in 2021. Finding no error, we defer to the Board's credibility determinations. *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. . . .").

Regarding treatment denials, the claim administrator must provide medically necessary and reasonably required medical treatment for a compensable injury. *See* W. Va. Code § 23-4-3 (2005) and W. Va. Code R. § 85-20-9.1 (2006). Here, the Board found that the MR arthrogram and right shoulder arthroscopy, extensive debridement, open biceps tenodesis, and rotator cuff repair are not medically necessary or reasonably required medical treatment for the compensable condition in this claim. In her August 4, 2022, Physician Review, Dr. Thaxton concluded that an MR arthrogram of the right shoulder was not related to the compensable claim. Similarly, Dr. Short stated that the requested right shoulder arthroscopy with debridement, open biceps tenodesis, and rotator cuff repair were for conditions unrelated to the compensable injury. Also, as noted by the Board, Dr. Agnew opined that Ms. Wilson-Mishow had reached MMI by June 15, 2022, and that no additional treatment was necessary. Based on the foregoing, we conclude that the Board's order is supported by substantial evidence in the record.

Accordingly, we affirm the Board's July 1, 2024, order, which affirmed the claim administrator's orders of October 12, 2022, November 16, 2022, and March 15, 2023.

Affirmed.

ISSUED: February 28, 2025

CONCURRED IN BY:

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