

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

PATRIOT COAL CORPORATION,
Employer Below, Petitioner

FILED
February 28, 2025

v.) No. 24-ICA-318 (JCN: 2009095421)

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

ANDREA O'NEAL, dependent of JASON O'NEAL (deceased),
Claimant Below, Respondent

MEMORANDUM DECISION

Petitioner Patriot Coal Corporation (“PCC”) appeals the July 17, 2024, order of the Workers’ Compensation Board of Review (“Board”). Respondent Andrea O’Neal filed a response.¹ PCC did not reply. The issue on appeal is whether the Board erred in reversing the claim administrator’s order, which denied the application for fatal dependent’s benefits.

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.

On June 20, 2009, while employed by PCC, Mr. O’Neal was injured in a coal mine accident. The injuries included: left hemipelvectomy with left iliac artery transection; bilateral testicle avulsion; left pneumothorax; sacroiliac joint fracture; crushed pelvis; traumatic above-the-knee amputation; bladder and urethral injuries; anal-rectal injury; and left subtrochanteric fracture. Mr. O’Neal required surgical intervention, which included fasciotomy, colostomy, ileostomy with renal stenting, thoracotomy, multiple skin procedures, and arterial ligations. Mr. O’Neal died on October 16, 2022. The death certificate dated October 17, 2022, identified the immediate cause of death as nonalcoholic steatohepatitis (“NASH”).² No conditions were listed as leading to the cause of NASH nor were any conditions listed under significant conditions contributing to death but not resulting in the underlying cause of death.

¹ PCC is represented by Toni J. Williams, Esq. Ms. O’Neal is represented by David H. Carriger, Esq., and L. Danté DiTrapano, Esq.

² A type of nonalcoholic fatty liver disease.

On March 29, 2023, the claim administrator issued an order denying Ms. O’Neal’s application for fatal dependent’s benefits based upon a finding that the cause of death as listed on the death certificate, NASH, was not related to the work injury.³ Ms. O’Neal protested this order.

Joseph Wiley, M.D., signed an affidavit dated August 7, 2023, indicating that he became Mr. O’Neal’s primary care provider in February 2022. Dr. Wiley stated that he was familiar with Mr. O’Neal’s past medical history including his workplace injury that he suffered in an underground mining accident on June 20, 2009. Dr. Wiley stated that Mr. O’Neal was left immobile as a result of his workplace accident, confined to a hospital bed inside his home for virtually all of the remaining 13 years of his life, and unable to engage in any meaningful exercise or physical activity during this substantial period of time. Dr. Wiley stated that Mr. O’Neal died on October 16, 2022, at the age of 41 due to complications of liver cirrhosis, which was secondary to NASH. Dr. Wiley stated that serologic testing for causes of Mr. O’Neal’s liver cirrhosis was done in early 2022, indicating that his NASH was unlikely to have been caused by any infectious process, or autoimmune disorder, nor was it an inherited/genetic condition. Dr. Wiley stated that obesity was a well-known and common cause of NASH, and Mr. O’Neal was obese and experienced significant additional weight gain after the workplace accident due to his severely limited mobility. Dr. Wiley opined that Mr. O’Neal’s chronic liver disease more likely than not was related to his obesity to which his permanent immobilization following his June 20, 2009, workplace injury contributed; and therefore, the workplace accident on June 20, 2009, was a contributory cause of his death.

Scott Lippe, M.D., signed an affidavit dated August 9, 2023, stating that he is Board Certified in both gastroenterology and internal medicine. Dr. Lippe stated that, as a gastroenterologist, he was familiar with the diagnosis and treatment of all diseases of the liver including nonalcoholic fatty liver disease (“NAFLD”) and NASH as well as the causes of these conditions as he also diagnosed and treated patients with these conditions as part of his clinical practice. Dr. Lippe noted that testing performed at the time of Mr. O’Neal’s injury showed no indication that he was suffering from fatty liver or other liver abnormality at that time. Dr. Lippe stated that he reviewed medical records pertaining to the medical care of Mr. O’Neal following his catastrophic workplace accident in June 2009 and continuing through his death in October 2022, and the affidavit of Dr. Wiley. Dr. Lippe stated that he agreed with Dr. Wiley’s opinion that Mr. O’Neal’s catastrophic workplace accident in 2009 contributed to his death from NASH. Dr. Lippe noted that serologic testing was done in 2022, ruling out any infectious process, autoimmune disorder, or inherited/genetic condition as the cause of Mr. O’Neal’s NASH. Dr. Lippe stated it was

³ Ms. O’Neal’s application for fatal dependent’s benefits was not included in the lower record.

important to remember that Mr. O’Neal was obese at the time of his workplace accident, but he had no apparent limitations on physical activity nor on his ability to exercise and he worked full time as a coal miner. He further stated that Mr. O’Neal experienced substantial weight gain following the amputation of his leg and other parts of his anatomy as a result of the workplace accident and the weight gain coincided with his being confined to a hospital bed and being unable to engage in any meaningful exercise or physical activity. Dr. Lippe stated that it was well documented that obesity was a cause of NAFLD, which can progress to NASH as it did in the case of Mr. O’Neal. Dr. Lippe stated that it was also well documented that structured exercise and physical activity can improve the outcome of patients who have already progressed to NASH. Dr. Lippe opined that Mr. O’Neal was not a candidate for any significant exercise program and could not engage in any meaningful physical activity because he was confined to a hospital bed for 13 years because of the catastrophic injuries sustained in his workplace accident. Dr. Lippe concluded that the workplace accident had the effect of preventing Mr. O’Neal from receiving an essential treatment for his NAFLD and NASH and without such treatment his fatty liver disease continued to progress until it became fatal. Dr. Lippe opined that Mr. O’Neal would not have died from NASH-induced cirrhosis if he had not sustained his workplace accident in 2009.

Robert Swedarsky, M.D., reviewed documents provided to him regarding Mr. O’Neal and issued a report dated January 23, 2024. Dr. Swedarsky opined that, after review of the medical record and current literature, it was not inevitable that Mr. O’Neal would develop nonalcoholic fatty liver disease-steatosis or progress to steatohepatitis and then develop cirrhosis as a consequence of his traumatic workplace injury. Dr. Swedarsky stated Mr. O’Neal was at high-risk for fatty liver disease, and all its consequences should have been recognized, and that the patient, his family, and caregivers should have been counseled on the risks of fatty liver disease. Dr. Swedarsky opined that, based on the relevant rehabilitation literature, a determined, proactive lifestyle intervention by his primary care physician, counselors, and caregivers, with attention to a healthy diet, weight loss, and upper body physical activity, in all likelihood could have succeeded in preventing morbidity related to fatty liver disease.

James Cosgrove, M.D., reviewed records regarding Mr. O’Neal and issued a report dated March 25, 2024. Dr. Cosgrove stated that there appeared to be a general agreement that the cause of death was NASH and there appeared to be widespread agreement that there was no underlying autoimmune nor infectious ideology. Dr. Cosgrove stated that NASH was strongly correlated with obesity, inactivity, and intake of ultra-processed foods, which was wholly consistent with Mr. O’Neal’s lifestyle for more than one decade. Dr. Cosgrove opined that the work injury of 2009 was not the direct result nor proximate cause of Mr. O’Neal’s NASH. Dr. Cosgrove opined that while he recognized that Mr. O’Neal’s mobility was limited and his situation was complex, at no time should he have been considered confined to bed.

Dr. Swedarsky was deposed on March 28, 2024, and he testified that he was a Board-Certified Pathologist. Dr. Swedarsky agreed that he did not have any Board Certification in internal medicine, nor any kind of primary care practice and he did not see patients in a clinical practice. Dr. Swedarsky stated that he reviewed medical records and documentation provided by PCC's counsel. Dr. Swedarsky stated that he reviewed the death certificate and agreed that the immediate cause of death was NASH and that there were no other underlying causes nor contributing conditions that were entered on the death certificate. Dr. Swedarsky opined that he could not directly relate NASH to the work injury of June 20, 2009. Dr. Swedarsky further opined that NASH was not a natural consequence of the work injury nor was it an expected outcome of the injury. Dr. Swedarsky stated that the underlying problem is fatty liver disease, which had to do with inactivity and diet, and can be reversed with diet modification, exercise, and weight loss. When asked whether there was any indication that Mr. O'Neal was able or unable to exercise, Dr. Swedarsky stated he could only go by the medical records and what physical therapy people were saying, and he had no firsthand knowledge as he never met Mr. O'Neal.

Dr. Swedarsky stated that during the time that Mr. O'Neal was in CAMC, they had him sitting up and out of bed for three or more hours in a wheelchair, he was doing outings, he was able to do upper body strengthening and exercise, and he got to the point where he could use the slide board with minimal assistance to get out of bed. When asked if he saw any documentation that Mr. O'Neal was offered any type of rehabilitation efforts after the hospital, and after the initial inpatient rehab, Dr. Swedarsky stated that there did not seem to be a well-organized program for him after he left the hospital and believed he declined those offers. Dr. Swedarsky stated that he disagreed with Dr. Lippe's opinion that Mr. O'Neal was not a candidate for any significant exercise program based on the fact that he participated in such a program following the injury, while he was in the hospital in 2009 and 2010. Dr. Swedarsky further disagreed with the statement from Dr. Wiley that Mr. O'Neal was immobile since he had been getting out of bed and could propel himself in a wheelchair at the hospital in 2009 and 2010. Dr. Swedarsky indicated that he did not see any medical documentation that stated Mr. O'Neal should be confined to bed. During cross examination, Dr. Swedarsky testified that he agreed that Mr. O'Neal had to be on narcotic pain medication for the rest of his life following the 2009 accident. When asked what weight loss and exercise programs had been prescribed for Mr. O'Neal but were not being done in the last approximate decade of his life, he indicated that Mr. O'Neal reported spending all of his time in bed. When asked specifically what was the program that he was supposed to be doing, he stated that he did not know if there was one.

On July 17, 2024, the Board reversed the claim administrator's order, which rejected the application for fatal dependent's benefits. The Board found that the evidence supports a finding that Mr. O'Neal's NASH caused or materially contributed to his death. PCC now appeals the Board's order.

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).

PCC argues that Mr. O'Neal's death was not in any manner caused by his work injury. PCC further argues that the Board relied on medical evidence that is neither well-reasoned nor well-documented and is critically lacking in requisite causal connection between Mr. O'Neal's death and the compensable work injury. We disagree.

Contrary to the assertions of PCC, the appropriate test under West Virginia § 23-4-10(b) is not whether different treatment or intervention could have resulted in a different outcome, or whether Mr. O'Neal's death was the result of the occupational injury exclusively, but whether the injury or disease contributed in any material degree to his death. *See Bradford v. Workers' Comp. Comm'r*, 185 W. Va. 434, 408 S.E.2d 13 (1991). Here, the Board determined that Ms. O'Neal has established by a preponderance of evidence that the compensable injury materially contributed to Mr. O'Neal's death. The Board found that "[Mr. O'Neal's] almost bedridden existence following the June 20, 2009, injury reasonably caused his weight gain due to lack of mobility and possibly a poor diet, which caused his liver condition that led to his death on October 16, 2022." The Board further found that the opinions of Drs. Wiley and Lippe were entitled to greater evidentiary weight and support a finding that the June 20, 2009, injury and its sequelae caused or materially contributed to Mr. O'Neal's death.

Upon review, we conclude that the Board was not clearly wrong in finding that the compensable injury materially contributed to Mr. O'Neal's death. As the Supreme Court

of Appeals of West Virginia has set forth, “[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 reversing the claim administrator’s order denying Ms. O’Neal’s application for fatal dependent’s benefits.

Accordingly, we affirm the Board’s July 17, 2024, order.

Affirmed.

ISSUED: February 28, 2025

CONCURRED IN BY:

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