IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

BRIAN LESTER,
Claimant Below, Petitioner

v.) No. 24-ICA-420 (JCN: 2023010592)

WEST VIRGINIA DIVISION OF HIGHWAYS,
Employer Below, Respondent

FILED
June 6, 2025
ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Brian Lester appeals the September 24, 2024, order of the Workers' Compensation Board of Review ("Board"). Respondent West Virginia Division of Highways ("WVDOH") filed a response.[1] Mr. Lester did not reply. The issue on appeal is whether the Board erred in affirming the claim administrator's orders, which 1) closed the claim for temporary total disability ("TTD") benefits based upon a finding that the medical evidence did not indicate that Mr. Lester continued to be disabled from the compensable injury; 2) denied the addition of bilateral SI radiculitis, thoracic myelopathy, and SI sprain to the claim as compensable conditions; and 3) denied authorization for physical therapy.

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 November 21, 2022, Mr. Lester filed an Employees' and Physicians' Report of Occupational Injury or Disease, indicating that he injured his back, spine, and legs on that day, when he was struck by a vehicle while working for WVDOH. The physician's portion of the application was completed on the same day by Dr. Nguyen, who indicated that Mr. Lester had sustained a lumbar strain and right leg contusion as a result of a motor vehicle collision.[2] An undated BrickStreet First Report of Injury form indicates that Mr. Lester was

[1] Mr. Lester is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq. WVDOH is represented by Steven K. Wellman, Esq., and James W. Heslep, Esq.

[2] Mr. Lester filed a second claim application dated December 11, 2022, in which he indicated that he also injured his right shoulder on November 21, 2022. The medical provider who completed the physician's section of the application indicated that the injury was occupational.

struck by a vehicle. By order dated January 6, 2023, the claim was held compensable for a lumbar strain and a contusion of the right leg.

Prior to the compensable injury, between 2018 and October of 2022, Mr. Lester was treated by Matthew Nelson, M.D., for multiple conditions involving his back, legs, and feet, including: unilateral primary osteoarthritis of the right knee; unilateral primary osteoarthritis of the left knee; idiopathic chronic gout of the right knee; effusion of the left knee; trochanteric bursitis of the right hip; and lumbago with right-sided sciatica. Straight leg raising tests were positive, and Mr. Lester had diminished lower extremity motor strength. He was also walking with a limp. An x-ray of Mr. Lester's hips dated August 23, 2022, revealed slight narrowing in the joint space of both hips. On October 10, 2022, Mr. Lester underwent an MRI of his lumbar spine due to low back pain, which revealed a small central and paracentral disc protrusion at L4-L5 and disc bulging at L5-S1 with right neural foraminal stenosis. Dr. Nelson recommended that Mr. Lester be referred to neurology.

Following the compensable injury, on December 1, 2022, Mr. Lester was seen by Nichole Mason, CMA, at Appalachian Regional Healthcare. CMA Mason requested authorization for referrals to Rajesh Patel, M.D., for an evaluation of Mr. Lester's spine and to Barry Vaught, M.D., for an evaluation of Mr. Lester's lower extremity neuropathy. Mr. Lester was taken off work until he could be evaluated by a neurologist and spinal surgeon.

On December 5, 2022, Mr. Lester began treating with Dr. Patel. Mr. Lester reported that he had been having lumbar symptoms and weakness in his right lower extremity with early foot drop since April 2022, but that these symptoms worsened after a motor vehicle accident in November 2022. Mr. Lester further reported pain and weakness in his lower back and right lower extremity and numbness in his arms, hands, fingers, right leg, and right foot. Dr. Patel assessed Mr. Lester with neural foraminal narrowing at L5-S1 on the right, right L5 radiculopathy, possible lumbar plexopathy, lumbar degenerative disc disease from L2 to S1, and lumbar facet arthropathy from L2 to S1. Dr. Patel recommended an EMG of Mr. Lester's lower extremities to look for signs of active radiculopathy. An EMG/NCS report of Mr. Lester's lower extremities dated January 3, 2023, revealed mild electrophysiological evidence of bilateral SI radiculopathy that was somewhat more prominent on the right.

Mr. Lester followed up with Dr. Patel on January 23, 2023, and he reported severe pain, weakness, and numbness in his lower back and right leg that had worsened after he was struck by a car on November 21, 2022. Dr. Patel assessed Mr. Lester with neural foraminal narrowing at L5-S1 on the right, right L5 radiculopathy, lumbar plexopathy, lumbar degenerative disc disease, lumbar sprain, and lumbar facet sprain. Dr. Patel recommended a repeat lumbar MRI and an MRI of the pelvis.

On February 5, 2023, Mr. Lester presented to the Beckley ARH emergency room. Mr. Lester reported that he struggled to walk after being involved in a motor vehicle accident, and he was using a walker when he lost his balance and fell. Mr. Lester complained of pain in both knees and his hips following the fall. X-rays of the pelvis and left knee revealed no evidence of acute injury. The impression was acute hip pain, suprapatellar effusion of the knee, and bilateral knee pain.

An MRI of Mr. Lester's lumbar spine was performed on February 16, 2023, revealing a small broad-based bulging annulus at L4-L5 and L5-S1 with no evidence of disc protrusion or stenosis. The radiologist noted that there was no change when the February 16, 2023, imaging was compared to a lumbar MRI performed on October 10, 2022.

On February 27, 2023, Mr. Lester returned to see Dr. Patel, who noted that Mr. Lester's lumbar imaging did not explain the degree of weakness and pain Mr. Lester was reporting in his lower extremities. Dr. Patel recommended a second neurosurgical opinion, and he further noted that the root of Mr. Lester's problems could be in the thoracic spine. Mr. Lester was instructed to remain off work.

Mr. Lester was seen at the WVU Medicine Department of Neurosurgery on April 11, 2023, for a second opinion neurosurgical evaluation. Mr. Lester reported that he had started using a walker after the injury, but his weakness progressed to the point that he was using a wheelchair. Mr. Lester reported associated pain in his lower legs, with the right leg being worse than the left. The assessment was weakness of the lower extremity. MRI studies of Mr. Lester's cervical and thoracic spine were ordered. On April 28, 2023, Mr. Lester underwent MRIs of his cervical and thoracic spine, revealing an intradural extra-axial lesion at T2-T3 measuring 1.5 x 4.0 cm in length. The lesion was located in the posterior spinal canal and displaced the cord anteriorly.

On May 1, 2023, Mr. Lester was seen by Dr. Patel, who noted that a recent MRI of Mr. Lester's thoracic spine revealed a mass around the thoracic spinal cord with significant compression of the spinal cord. Dr. Patel assessed an intradural mass of the upper thoracic spine, thoracic sprain, lumbar sprain, lumbar radiculitis, and lumbar disc bulging at L4-L5. Dr. Patel recommended that Mr. Lester undergo surgery, and indicated that Mr. Lester was to remain off work until August 2, 2023. A T2-T3 laminectomy for tumor resection was scheduled for May 8, 2023.

On May 8, 2023, Mr. Lester underwent a T2-T3 laminectomy with resection of an intradural thoracic lesion. Mr. Lester began inpatient physical rehabilitation on May 9, 2023. An Attending Physician's Report from Kyle Zhang, M.D., dated May 20, 2023, recommended physical therapy ("PT") for the treatment of Mr. Lester's spinal cord injury.

Dr. Zhang indicated that Mr. Lester would remain temporarily and totally disabled for the foreseeable future.

Rebecca Thaxton, M.D., completed a Physician Review report dated May 25, 2023. Dr. Thaxton opined that Mr. Lester's extra medullary spinal cord tumor should not be added as a compensable condition in the claim. She further opined that Mr. Lester's thoracic surgery and hospital admission were unrelated to the compensable injury. Dr. Thaxton stated that the compensable injury did not cause the tumor, but the tumor was revealed due to the treatment Mr. Lester received after the injury.

On June 26, 2023, and August 2, 2023, Mr. Lester followed up with Dr. Patel, who noted that Mr. Lester was showing some signs of improvement. Mr. Lester reported very little pain but stated that he continued to have significant weakness. Dr. Patel assessed status post thoracic laminectomy for tumor resection, lumbar sprain, and thoracic sprain. Dr. Patel recommended PT and injections for the disc bulging at L4-L5 and a repeat thoracic MRI to make sure there was no recurrence of the tumor. Mr. Lester was advised to remain off work until September 18, 2023.

Mr. Lester was evaluated by David Soulsby, M.D., on August 15, 2023. Mr. Lester reported that he still had significant weakness and difficulty with balance. Dr. Soulsby diagnosed Mr. Lester with a resolved lumbar sprain/strain, a resolved right lower extremity contusion, and a thoracic meningioma with myelopathy. Dr. Soulsby opined that the thoracic tumor was a pre-existing condition that was neither caused nor aggravated by the compensable injury. He further opined that the range of motion abnormalities in Mr. Lester's right hip and right lower extremity were due to the preexisting thoracic tumor. Dr. Soulsby found Mr. Lester to be at maximum medical improvement ("MMI") in regard to the compensable lumbar sprain/strain and right lower extremity contusion.

On September 18, 2023, Mr. Lester was seen by Dr. Patel who noted that Mr. Lester was making progress in regard to his mid-back and leg pain. Dr. Patel assessed Mr. Lester with a lumbar sprain, bilateral S1 radiculitis, status post laminectomy with tumor resection, thoracic sprain, neural foraminal narrowing at L5-S1 on the right, lumbago, and sacroiliac joint pain. Dr. Patel did not agree with Dr. Soulsby's assessment that Mr. Lester was at MMI. Dr. Patel indicated that Mr. Lester remained temporarily and totally disabled and would need to continue with PT and possible epidural injections. Dr. Patel indicated that Mr. Lester would be unable to work through March 18, 2024. By Diagnosis Update form dated December 12, 2023, Dr. Patel requested that bilateral S1 radiculitis, thoracic myelopathy, and SI sprain be added as compensable diagnoses in the claim.

James Dauphin, M.D., completed a Physician Review report dated December 21, 2023. Dr. Dauphin opined that the diagnosis of thoracic myelopathy was related to Mr. Lester's preexisting thoracic cord tumor and should not be added as a compensable

condition in the claim. Regarding bilateral S1 radiculitis and SI joint sprain, Dr. Dauphin noted that Mr. Lester was being treated for weakness in his lower extremities prior to the compensable injury, and thus, he opined that the diagnoses of bilateral S1 radiculitis and SI joint sprain were preexisting and causally unrelated to the compensable injury.

On December 27, 2023, the claim administrator issued a grievable decision denying Dr. Patel's request to add bilateral S1 radiculitis, thoracic myelopathy, and SI sprain as compensable diagnoses in the claim based on Dr. Dauphin's report. On January 30, 2024, the Encova Select Grievance Board determined that the claim administrator's grievable decision denying bilateral S1 radiculitis, thoracic myelopathy, and SI sprain as compensable diagnoses should be affirmed.

Mr. Lester was seen by Dr. Patel on March 13, 2024. Dr. Patel assessed a lumbar sprain, a thoracic sprain, bilateral S1 radiculitis, status post laminectomy with tumor resection of the thoracic spine, neural foraminal narrowing at L5-S1 on the right, and sacroiliac joint pain. Dr. Patel recommended that Mr. Lester remain off work and continue with PT. He believed Mr. Lester would not be at MMI for another eight to twelve months. Dr. Patel recommended a functional capacity evaluation to assess Mr. Lester's residual functional capacity.

On March 19, 2024, Mr. Lester was reevaluated by Dr. Soulsby, who opined that the diagnoses of bilateral S1 radiculitis, thoracic myelopathy, and SI joint sprain were not causally related to Mr. Lester's compensable injury. Dr. Soulsby stated that Mr. Lester did not describe radicular pain, and he opined that there were no objective findings of radiculopathy in the S1 distribution. Dr. Soulsby attributed Mr. Lester's lower extremity motor weakness to non-compensable thoracic myelopathy. Dr. Soulsby opined that poorly localized pain in the absence of objective findings did not support a diagnosis of sacroiliac pathology. Dr. Soulsby further opined that Mr. Lester's thoracic myelopathy was a direct result of thoracic cord compression from a thoracic tumor that is not associated with trauma. Dr. Soulsby found Mr. Lester to be at MMI in regard to the compensable injury and in need of no further treatment.

Dr. Patel completed a Diagnosis Update form on March 25, 2024, requesting that thoracic myelopathy be added as a compensable diagnosis in the claim. Dr. Patel opined that Mr. Lester's thoracic myelopathy resulted from the compensable injury based upon a finding that Mr. Lester's thoracic tumor only became symptomatic as a result of the compensable injury.

Dr. Thaxton completed a Physician Review report dated April 2, 2024. Dr. Thaxton opined that a request for PT for status post laminectomy with tumor resection of the thoracic spine was not medically necessary or reasonably required for treatment of the compensable injury. Specifically, Dr. Thaxton opined that the medical evidence did not

support a finding that Mr. Lester's intradural extramedullary tumor was caused by the compensable work injury.

By grievable decision dated April 5, 2024, the claim administrator denied Dr. Patel's request for PT for status post laminectomy with tumor resection of the thoracic spine and ongoing symptoms of weakness and gait difficulty based on Dr. Thaxton's report. On May 28, 2024, the Encova Select Grievance Board determined that the claim administrator's grievable decision denying PT should be affirmed.

On September 24, 2024, the Board affirmed the claim administrator's orders 1) closing the claim for TTD benefits; 2) denying the addition of bilateral SI radiculitis, thoracic myelopathy, and SI sprain to the claim as compensable conditions; and 3) denying authorization for physical therapy. The Board found that Mr. Lester failed to show by a preponderance of the evidence that the diagnoses of bilateral S1 radiculitis, thoracic myelopathy, and SI sprain should be added as compensable conditions in the claim. The board further found that the evidence does not establish that PT is medically necessary and reasonably required treatment of the compensable injury. Mr. Lester 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:
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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).

Mr. Lester argues that Dr. Patel, his treating surgeon, opined that Mr. Lester's problem is unique, as he did have a preexisting thoracic meningioma, but that the

compensable injury caused it to become symptomatic sooner than it would have if the injury had not occurred. Further, Mr. Lester argues that Dr. Patel stated that Mr. Lester's treatment for the injury regarding his back had been put on hold while the tumor was treated, that Mr. Lester is still having symptoms in his back due to the injury, and now that the tumor has been removed, it is time to continue such treatment. Mr. Lester also argues that, while he did have some symptoms prior to the injury at hand, they were not significant and did not keep him from performing his job duties. Finally, Mr. Lester argues that Dr. Patel is in the best position to determine which diagnoses were brought on due to the compensable injury, and whether he continues to be disabled, and Dr. Patel's opinion should be afforded greater weight.

Three elements must coexist in workers' compensation cases to establish compensability: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment. *See Barnett v. State Workmen's Comp. Comm'r,* 153 W. Va. 796, 172 S.E.2d 698 (1970); *Sansom v. Workers' Comp. Comm'r,* 176 W. Va. 545, 346 S.E.2d 63 (1986). The claim administrator must provide a claimant with medically related and reasonably necessary treatment for a compensable injury. *See* West Virginia Code § 23-4-3 (2005) and West Virginia Code of State Rules § 85-20 (2006).

The Supreme Court of Appeals of West Virginia held, in *Gill v. City of Charleston,* 236 W. Va. 737, 783 S.E.2d 857 (2016):

> A noncompensable preexisting injury may not be added as a compensable component of a claim for workers' compensation medical benefits merely because it may have been aggravated by a compensable injury. To the extent that the aggravation of a noncompensable preexisting injury results in a [discrete] new injury, that new injury may be found compensable.

Id. at 738, 783 S.E.2d at 858, syl. pt. 3.

The Supreme Court clarified its position in *Moore v. ICG Tygart Valley, LLC*, 247 W. Va. 292, 879 S.E.2d 779 (2022), holding:

> A claimant's disability will be presumed to have resulted from the compensable injury if: (1) before the injury, the claimant's preexisting disease or condition was asymptomatic, and (2) following the injury, the symptoms of the disabling disease or condition appeared and continuously manifested themselves afterwards. There still must be sufficient medical evidence to show a causal relationship between the compensable injury and the disability, or the nature of the accident, combined with the other facts of the case, raises a natural inference of causation. This presumption is not conclusive; it may be rebutted by the employer.

Id. at 294, 879 S.E. 2d at 781, syl. pt. 5.

The claim administrator must provide a claimant with medically related and reasonably necessary treatment for a compensable injury. *See* West Virginia Code § 23-4-3 (2005) and West Virginia Code of State Rules § 85-20 (2006). *See Blackhawk Mining, LLC v. Argabright*, __ W. Va. __, 915 S.E.2d 7 (Ct. App. May 1, 2023) (affirmed by the Supreme Court of Appeals of West Virginia in *Argabright v. Blackhawk Mining, LLC*, No. 23-381, 2024 WL 3984505 (2024) (memorandum decision)).

West Virginia Code § 23-4-7a(e) (2005) provides: "In all cases, a finding . . . . that the claimant has reached his or her maximum degree of improvement terminates the claimant's entitlement to temporary total disability benefits regardless of whether the claimant has been released to return to work."

Here, the Board determined that the weight of the evidence establishes that Mr. Lester's thoracic tumor was not caused by the compensable injury. The Board noted that Drs. Thaxton, Soulsby, and Dauphin all opined that the thoracic tumor and the thoracic myelopathy that resulted from the tumor were unrelated to the compensable injury and should not be covered under the claim. The Board also noted that Mr. Lester was having symptoms prior to the compensable injury, specifically, a limp, pain in his hip and low back, and reduced motor strength. The Board further determined that bilateral S1 radiculitis was not causally related to the compensable injury. The Board found that, although Dr. Patel requested that bilateral S1 radiculitis be added to the claim, he failed to address Mr. Lester's pre-injury symptoms, and he did not adequately explain how the diagnosis is causally related to the compensable injury. Regarding the diagnosis of SI sprain, the Board found that the weight of the evidence fails to support a finding that SI sprain should be added to the claim. The Board noted that Dr. Patel did not explain why it took over a year for the SI sprain diagnoses to manifest, he offered no clinical findings to support the diagnosis, and he failed to explain how the diagnosis is causally related to the compensable injury. The Board analyzed the claim under *Gill* and *Moore* and found that the weight of the evidence shows that the requested diagnoses are not causally related to the compensable injury.

Regarding TTD, the Board found that this claim was properly closed for TTD benefits. The Board noted that Dr. Soulsby performed a medical evaluation of Mr. Lester on August 15, 2023, and found Mr. Lester's compensable diagnoses to be at MMI. The Board further noted that, although Dr. Patel indicated that Mr. Lester was not at MMI, this finding of continued disability is based upon the non-compensable conditions of bilateral S1 radiculitis, thoracic myelopathy, SI sprain, status post laminectomy with tumor resection of the thoracic spine, and neural foraminal narrowing at L5-S1. Regarding the denial of authorization for PT, the Board found that there is no medical evidence of record to support a finding that additional PT is medically necessary and reasonably required

treatment for Mr. Lester's compensable lumbar sprain/strain and right leg contusion injuries.

Upon review, we conclude that, based on the record, the Board was not clearly wrong in finding that the weight of the evidence establishes that bilateral SI radiculitis, thoracic myelopathy, and SI sprain were not causally related to the compensable injury and were, instead, related to the preexisting thoracic tumor. Further, we conclude that the Board was not clearly wrong in finding that TTD benefits were properly closed in this claim, as Mr. Lester has been found to be at MMI for his compensable conditions. Finally, we conclude that the Board was not clearly wrong in finding that PT was not medically necessary nor reasonably required for treatment of the compensable injuries.

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 affirming the claim administrator's orders, which 1) closed the claim for TTD benefits; 2) denied the addition of bilateral SI radiculitis, thoracic myelopathy, and SI sprain to the claim as compensable conditions; and 3) denied authorization for PT.

Accordingly, we affirm the Board's September 24, 2024, order.

Affirmed.

ISSUED: June 6, 2025

CONCURRED IN BY:

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