

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

BLACKHAWK MINING, LLC,
Employer Below, Petitioner

v.) No. 24-ICA-474 (JCN: 2019019394)

RICHARD ULLMAN,
Claimant Below, Respondent

FILED
June 6, 2025

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

MEMORANDUM DECISION

Petitioner Blackhawk Mining, LLC (“Blackhawk”) appeals the October 31, 2024, order of the Workers’ Compensation Board of Review (“Board”). Respondent Richard Ullman filed a response.¹ Blackhawk filed a reply. The issue on appeal is whether the Board erred by reversing the claim administrator’s order and holding that Mr. Ullman met his burden of proof to show that a L5-S1 transforaminal lumbar fusion (“TLIF”) procedure was medically necessary and reasonably required for treatment of the compensable injury.

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.

This claim arose on November 9, 2017, when Mr. Ullman sustained an injury to his lower back when he was struck by a cable while working for Blackhawk. He filed his workers’ compensation claim on November 13, 2017, which was held compensable for lumbar sprain/strain by order dated November 30, 2017. Mr. Ullman had a second work-related injury to his lower back on December 5, 2018.

On May 7, 2019, Mr. Ullman was examined by Dr. Syam Stoll, M.D. Dr. Stoll opined that Mr. Ullman’s November 9, 2017, lumbar strain/sprain had completely resolved prior to the injury of December 5, 2018. By decision dated December 18, 2019, the Office of Judges added lumbosacral radiculopathy as a compensable diagnosis of the November 9, 2017, injury, and authorized a consultation with an orthopedic surgeon.

On August 25, 2020, Mr. Ullman underwent a right-side microscopic lumbar discectomy at L5-S1 performed by Orthopaedic Spine Surgeon, Dr. Rajesh Patel, M.D. The post-operative diagnoses were lumbar disc herniation at L5-S1 on the right, right

¹ Blackhawk is represented by Billy R. Shelton, Esq. Mr. Ullman is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq.

radiculopathy and lumbar sprain. Such procedure was authorized pursuant to the November 9, 2017, injury claim.²

Following the August 25, 2020, procedure, Mr. Ullman continued treatment with Dr. Patel. By August 28, 2023, Dr. Patel noted Mr. Ullman's severe lower back pain was progressively worsening. He reported declining relief following the series of medial branch block injections. The assessment was lumbar post laminectomy syndrome at L5-S1, bilateral neural foraminal narrowing at L5-S1, lumbar degenerative disc disease at L5-S1, lumbar facet sprain, lumbago, cervical spondylosis, and cervical sprain. Dr. Patel believed that it was time to consider lumbar fusion surgery because Mr. Ullman was no longer responding to conservative treatment.

On January 14, 2021, Mr. Ullman had an independent medical evaluation performed by Dr. Stoll to determine the level of impairment in his lumbar region. Dr. Stoll assessed a 10% whole body impairment related to the November 9, 2017, injury. Dr. Stoll also opined that Mr. Ullman had reached maximum medical improvement since his injury and did not need any additional medical treatment for the November 9, 2017, injury.

In his notes from September 27, 2023, Dr. Patel reported that Mr. Ullman's recent MRI showed bilateral neural foraminal narrowing at L5-S1 with postoperative changes, severe disc degeneration, and modic and plate changes. Dr. Patel noted that the MRI revealed significant collapse where Mr. Ullman previously had decompression surgery at L5-S1, and had reached the point where Mr. Ullman could no longer continue working. Dr. Patel explained that it was medically reasonable to proceed with the L5-S1 posterior lumbar interbody fusion with decompression and revision at L5-S1 on the right side with instrumentation and prosthetic device placement to stabilize the L5-S1 region and improve Mr. Ullman's symptoms.

Mr. Ullman was seen by Dr. Stoll for another independent medical evaluation on December 13, 2023. Dr. Stoll indicated that the ongoing subjective complaints by Mr. Ullman are due to the natural progression of aging of pre-existing lumbar spondylosis. Dr. Stoll opined that the ongoing subjective complaints are not supported by the objective medical documentation since Mr. Ullman underwent appropriate treatment for the injury and was placed at maximum medical improvement on January 14, 2021. Dr. Stoll further stated that in Dr. Patel's follow-up office note of September 27, 2023, there is no mention of Mr. Ullman's back going out at work, but a reference to Mr. Ullman's complaints of ongoing low back pain with no mention of a work injury. Dr. Stoll opined that the current proposed L5-S1 lumbar fusion is not supported by evidence-based medicine treatment guidelines and the current subjective complaint of axial low back pain does not warrant an

² The Board's October 31, 2024, order specifically found at Finding of Fact #8 that authorization for this procedure pursuant to the November 9, 2017, injury claim was noted in the April 21, 2022, decision of the Administrative Law Judge.

L5-S1 lumbar fusion. He further stated that there are no objective findings to substantiate active lumbar radiculopathy, or spinal instability that would warrant the proposed procedure. Additionally, Dr. Stoll noted that the patient pain diagram that Mr. Ullman completed prior to his evaluation did not support any lumbar radiculopathy. On March 6, 2024, the claim administrator issued its order denying authorization for the TLIF based upon Dr. Stoll's medical report of December 13, 2023.

On April 8, 2024, Mr. Ullman testified, by deposition, that he had undergone a lumbar discectomy on August 25, 2020, and had returned to work a few months after. His symptoms did not fully resolve, and he continued treating with his orthopedic surgeon, Dr. Patel. Mr. Ullman stated that he continued to get injections, but in July of 2023, the injections became ineffective, and Dr. Patel told him the recent MRI revealed his vertebrae to be bone on bone. Mr. Ullman testified that on September 16, 2023, his back went out at work, and he fell when he was simply walking. He submitted an incident report but did not file a new workers' compensation claim because he and Dr. Patel believed it to be a continuation of the original injury. Mr. Ullman testified that he had not been able to return to work since, and that Dr. Patel said he could not return until after surgery. According to Mr. Ullman, his lower back continues to go out on him suddenly and unpredictably, and that his wife has to help him walk around their house.

Dr. Patel submitted a letter dated June 19, 2024. In that letter, Dr. Patel explained that the pathology was directly related to the compensable injury, especially since the other levels of Mr. Ullman's spine were well preserved, and it was only the single, isolated disc at the level of the original injury that seemed to be problematic. Dr. Patel stated that the fusion was medically reasonable as Mr. Ullman had been through multiple conservative treatment measures, the benefits outweighed the potential risks, and the procedure could improve Mr. Ullman's functional capabilities.

On August 14, 2024, Dr. Stoll issued an addendum report after reviewing Dr. Patel's June 19, 2024, letter. Dr. Stoll took issue with Dr. Patel's statement that Mr. Ullman has been through multiple conservative measures, including multiple injections and therapy options. During Dr. Stoll's evaluation, Mr. Ullman reported that he had not undergone any formal physical therapy since his prior evaluation. Dr. Stoll indicated that the proposed surgery would be for the treatment of pre-existing lumbar spondylosis and not any acute lumbar disc herniation or nerve root impingement.

On October 31, 2024, the Board issued its order reversing the claim administrator and authorizing the TLIF for Mr. Ullman. In that order, the Board noted that Mr. Ullman's November 9, 2017, injury was previously held compensable for lumbar sprain/strain and lumbar radiculopathy. Thereafter, Mr. Ullman's symptoms failed to improve with conservative treatments, which prompted a referral to Dr. Patel, an orthopedic surgeon. Dr. Patel eventually performed an authorized right-side microscopic discectomy at Mr. Ullman's L5-S1, which somewhat improved Mr. Ullman's symptoms though he still

required management with injections. However, the injections lost their efficacy and Mr. Ullman began to experience symptoms that interfered with his functional ability, including his ability to work. An MRI ordered by Dr. Patel showed significant degenerative changes at the L5-S1 level with significant collapse of the disc space height, and nerve root impingement in the area of the prior discectomy.

The Board concluded that the weight of evidence established that Dr. Patel's request for TLIF was medically necessary and causally related to the compensable injury. The Board noted that Dr. Patel, who has treated Mr. Ullman consistently for four years, was better positioned to accurately assess Mr. Ullman's condition and medical treatment needs. The Board went on to note that Dr. Stoll's opinions were not consistent with the weight of the medical evidence. For instance, Dr. Stoll found that the recent MRI results at L5-S1 reflected the natural progression of preexisting lumbar spondylosis, however, the Board noted, the recent MRI results show that Mr. Ullman's current pathology is localized to the specific region of the lumbar spine that was directly affected by the compensable injury while the rest of his lumbar spine is in good condition. Similarly, Dr. Stoll asserted that there were no objective findings of lumbar radiculopathy, but that assertion is contradicted by Dr. Patel's September 27, 2023, notes, and his June 19, 2024, letter. The Board also noted that there was no evidence in the record to support Dr. Stoll's suggestion that Mr. Ullman's back going out on September 16, 2023, was the result of a new workplace injury and not a continuation of the natural progression of the November 9, 2017, injury. Based on the foregoing, the Board held that Mr. Ullman showed by a preponderance of the evidence that the request for TLIF is medically necessary and reasonably required for treatment of the compensable injury. It is from this order that Blackhawk 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, Blackhawk asserts that the Board was clearly erroneous in granting authorization for TLIF at L5-S1. We disagree. The claim administrator must provide a claimant with medically related and reasonably necessary treatment for a compensable injury. *See* W. Va. Code § 23-4-3 (2005) and W. Va. Code R. § 85-20 (2006). Here, the November 9, 2017, injury was previously held compensable for lumbar sprain/strain and radiculopathy. Further, the evidence in the record supports Dr. Patel’s opinion that the requested treatment is medically related and reasonably necessary for the treatment of the compensable injury. When confronted with conflicting medical opinions, the Board must consider the record in its entirety and adequately explain the basis for choosing one medical opinion over the other. *Gwinn v. JP Morgan Chase*, No. 23-172, 2024 WL 4767011, at *4 (W. Va. Nov. 13, 2024) (memorandum decision). Here, the Board was presented with the conflicting medical opinions of Drs. Stoll and Patel. The Board clearly considered the record as a whole and, as discussed previously, explained that it found Dr. Patel’s opinions persuasive because Dr. Patel was in a better position to accurately assess Mr. Ullman’s condition and medical treatment needs, and Dr. Stoll’s medical opinions were inconsistent with the weight of the evidence.

Upon review, we conclude that the Board was not clearly wrong in finding Mr. Ullman established that the requested treatment is medically necessary and reasonably required for the treatment of the compensable injury. 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 authorization for the TLIF procedure.

Accordingly, we affirm the Board’s October 31, 2024, order.

Affirmed.

ISSUED: June 6, 2025

CONCURRED IN BY:

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