

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ELIZABETH POTTER,
Claimant Below, Petitioner

vs.) **No. 12-0650** (BOR Appeal No. 2046582)
(Claim No. 2011012734)

PINNACLE MINING COMPANY, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Elizabeth Potter, by Gregory Prudich, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Pinnacle Mining Company, LLC, by Sean Harter, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 26, 2012, in which the Board affirmed, the November 7, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's November 23, 2010, decision denying compensability for the claim. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, on the issue of compensability of the right hip contusion and left elbow strain, the Court finds no substantial question of law and no prejudicial error. Regarding the issue of the Board of Review's determination that the L5-S1 herniated disc is not a compensable component of the claim, the Court finds that the Board of Review's decision is based upon a material misstatement or mischaracterization of the evidentiary record. This case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion.

Ms. Potter injured her right hip, left elbow, and lower back in the course of her employment when she fell in a mine. The claim was rejected by the claims administrator on November 23, 2010. She initially reported that the injury was a hip contusion but a few days

later began experiencing symptoms in her back and elbow as well. An MRI taken on October 12, 2012, showed that she had a herniated disc at the L5-S1 disc region. Reports show that she continued to experience lumbosacral pain which radiated into her legs.

In a deposition on April 8, 2011, Ms. Potter testified that she had trouble doing daily chores because of pain. She stated that at times the pain was worse than others. She said that she never experienced pain radiating into her right leg before the accident. She testified that she had previously injured her mid-back at work, but that injury healed and was no longer symptomatic. She also stated that she had recently been in a car accident that caused pain in her arm and neck, but she experienced no lingering problems from it. She testified that before the accident she had no problem performing her job duties, which included lifting and bending. After the accident however, she found herself unable to return to work.

Her main health care provider for this work injury was J.D. Shorter, PA. In a deposition on April 20, 2011, he testified Ms. Potter reported she was experiencing pain in her right hip and lower back from a fall at work. He said that if the disc was herniated before her injury, she would have experienced symptoms and had difficulty performing her job duties. After examining her on multiple occasions and reviewing her MRI results, it was his opinion that the herniated disc was the result of the work-related injury. During the deposition he was made aware of Ms. Potter's previous back injury and car accidents. He testified that those injuries, which had healed and remained asymptomatic, did not change his assessment. Mr. Shorter referred Ms. Potter for a consultation with Robert Crow, M.D. Dr. Crow observed that she was suffering from sciatica which was rendered symptomatic either by the disc herniation or traumatic injury to the sciatic nerve in the hip.

The Office of Judges reversed the decision of the claims administrator in its November 7, 2011, Order. It held that Ms. Potter's right hip and left elbow injuries were compensable components of the claim. The Office of Judges found that both Ms. Potter and her employer reported that she fell at work and struck her right hip and left elbow. She was treated for the hip contusion the same day as the accident. Three days later, she was treated for the left elbow strain. The Office of Judges determined that she reported that her left elbow began hurting the day after the accident. The Office of Judges found no evidence to dispute Ms. Potter's assertion that she suffered a right hip contusion and left elbow strain in the course of her employment.

The Office of Judges did find, however, that the herniated L5-S1 disc was not compensable. The Office of Judges found that Ms. Potter previously had low back pain. This was shown in a 2008 report that indicated she had pain in her coccyx. The Office of Judges also determined that an MRI taken a few days after the injury showed she had degenerative signal abnormalities as well as a herniated disc. The Office of Judges relied on the report of Dr. Crow who found that Ms. Potter's lower extremity symptoms were the result of the herniated disc becoming symptomatic or a right hip nerve injury.

The Office of Judges concluded Ms. Potter's testimony was not credible, because she testified in her deposition that she could not do household chores but was observed a few weeks later operating a weed eater. She also testified that she had no prior back pain, but the 2008

report indicates otherwise. The Office of Judges also determined that Mr. Shorter's opinion, that the herniated disc was caused by the work-related injury, was not credible. It found that he was unaware of Ms. Potter's prior back pain, occupational injury, and motor vehicle accidents. Mr. Shorter, the Office of Judges found, concluded that Ms. Potter could not do her job if she had a herniated disc. The Office of Judges determined that this was wrong, because Mr. Shorter had no way of knowing when the herniation occurred. He testified in his deposition that he could not pinpoint when the disc herniated.

The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order in its April 26, 2012, decision. This Court finds that the Office of Judges mischaracterized and misstated the evidentiary record regarding the L5-S1 disc herniation. While Ms. Potter did testify she had previously experienced pain in her back, she asserted that it had long since dissipated. The Office of Judges incorrectly relied on an MRI that indicated some degenerative changes in the spine. Mr. Shorter read that MRI and took it into consideration before he made the determination that the herniated disc was the result of Ms. Potter's work-related injury. The Office of Judges misstated the report of Dr. Crow. It stated his findings in a way that made it seem as if the sciatic symptoms were the result of the herniated disc becoming symptomatic. What the report actually indicated was "right sciatica, questionably symptomatic from right L5-S1 disc hernia, versus traumatic injury to the right sciatic nerve in the hip".

The Office of Judges mischaracterized the opinion of Mr. Shorter, the only medical professional on the record to give an opinion regarding the cause of the disc herniation. It found he was unaware of Ms. Potter's previous history regarding back injury and pain. However, Mr. Shorter was made aware of that history during his deposition. He testified that the previous injuries, which had since healed and remained asymptomatic, did not change his opinion. Lastly, the Office of Judges misstated Ms. Potter's deposition testimony. It found that she was not credible, because she testified that she could not do household chores, and a subsequent surveillance video showed her weed eating the lawn. What she actually said in her deposition was that chores were more difficult due to pain. She also said that at times her back pain was worse than others.

The Office of Judges was correct in its determination that the left elbow strain and right hip contusion were compensable components of the claim. The evidentiary record indicates that these injuries were received in the course of employment.

For the foregoing reasons, we find that the decision of the Board of Review is based in part upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review that the right hip contusion and left elbow strain are compensable components of the claim is affirmed. The decision of the Board of Review is reversed insofar as it held that the L5-S1 disc herniation was not a compensable component of the claim. The case is remanded with instructions to add L5-S1 disc herniation as a compensable component of the claim.

Affirmed, in part, and Reversed and Remanded, in part.

ISSUED: January 14, 2014

CONCURRED IN BY:

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II

Chief Justice Robin J. Davis concurs with the findings of compensability of the right hip contusion and left elbow strain and dissents with the majority's finding of compensability of the L5-S1 herniated disc.

Justice Brent D. Benjamin, Not Participating