

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

ROBERT SMITH,
Claimant Below, Petitioner

vs.) No. 20-0667 (BOR Appeal No. 2055234)
(Claim No. 2019018163)

MURRAY AMERICAN ENERGY, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Robert Smith, by counsel J. Thomas Greene Jr. and T. Colin Greene, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Murray American Energy, Inc., by counsel Aimee M. Stern, filed a timely response.

The issues on appeal are compensability, medical treatment, and temporary total disability benefits. Mr. Smith protested four Orders issued by the claims administrator concerning his claim. In the first Order dated April 5, 2019, the claims administrator denied an authorization request from Bridgeport Express Care for treatment for the left elbow. On June 7, 2019, the claims administrator denied an authorization request for testing of the right elbow and a TENS unit. On July 18, 2019, the claims administrator closed the claim for temporary total disability benefits. Finally, on August 27, 2019, the claims administrator issued an Order accepting the claim for the conditions of strain of muscle, fascia and tendon of lower back and strain of muscle, fascia and tendon of right hip and denying the conditions of medial epicondylitis, right elbow; lateral epicondylitis, right elbow; lateral epicondylitis, left elbow; and numbness and in tingling both hands. On February 26, 2020, the Workers' Compensation Office of Judges ("Office of Judges") affirmed the four Orders issued by the claims administrator. This appeal arises from the Board of Review's Order dated July 30, 2020, in which the Board affirmed the February 26, 2020, Decision of the Office of Judges.

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, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

The standard of review applicable to this Court's consideration of workers' compensation appeals has been set out under W. Va. Code § 23-5-15, in relevant part, as follows:

(b) In reviewing a decision of the board of review, the supreme court of appeals shall consider the record provided by the board and give deference to the board's findings, reasoning and conclusions.

(c) If the decision of the board represents an affirmation of a prior ruling by both the commission and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of Constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record.

See Hammons v. W. Va. Off. of Ins. Comm'r, 235 W. Va. 577, 582-83, 775 S.E.2d 458, 463-64 (2015). As we previously recognized in *Justice v. West Virginia Office Insurance Commission*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012), we apply a de novo standard of review to questions of law arising in the context of decisions issued by the Board. *See also Davies v. W. Va. Off. of Ins. Comm'r*, 227 W. Va. 330, 334, 708 S.E.2d 524, 528 (2011).

Mr. Smith, a coal miner, was injured in the course of and resulting from his employment with Murray American Energy, Inc., on February 7, 2019, when he slipped and fell backwards onto a mound of dumped concrete. He presented to Bridgeport Express Care on February 13, 2019, complaining of right rib pain. On examination, Mr. Smith's right posterior rib was noted to be tender. He was diagnosed with intercostal pain. A Report of Injury was filed on February 13, 2019, listing the injured body parts as right side ribs, arm, and leg. The compensable diagnosis was right rib injury. Mr. Smith continued to follow-up with Bridgeport Express Care over the next month, and he reported continued pain in his ribs on the right side. By Order dated March 8, 2019, the claims administrator held the claim compensable for low back strain and right hip strain.

Mr. Smith began treatment at Bridgeport Physical Therapy on March 13, 2019. He reported that he landed on his right side when he fell, and he complained of right sided trunk pain. On March 19, 2019, he returned to Bridgeport Express Care for treatment, and he complained of low back, rib, and right elbow pain. On examination, tenderness to palpation was noted over the lateral epicondyle of Mr. Smith's right elbow and the right side of the paravertebral muscles; neck movements were painful with flexion beyond 30° and extension beyond 10°; and paravertebral spasm, tenderness and tight muscle band were noted on the right side. Mr. Smith was diagnosed with dorsalgia, intercostal pain, and pain in the right elbow. A right elbow x-ray showed a small avulsion of the lateral epicondyle versus an unfused secondary ossification center. It was suggested that Mr. Smith needed to see an orthopedic surgeon for his condition.

Mr. Smith was treated by Amber Slider, M.A., and William Nelson, PA-C, at the Orthopaedic Clinic on April 3, 2019, with a chief complaint of a bilateral elbow injury. It was noted that he reported falling on concrete at work on February 7, 2019. The assessments were medial epicondylitis of the right elbow, biceps tendinitis of the right upper extremity, tendinitis of the right triceps, and lateral epicondylitis of both elbows. The examination of the left upper extremity showed tenderness over the lateral epicondyle of the elbow and pain with extension of the wrist. The plan was to treat Mr. Smith conservatively.

After receiving the findings of the Orthopaedic Clinic, a request for authorization was prepared by Bridgeport Express Care on April 3, 2019, for treatment of Mr. Smith's left elbow. By Order of the claims administrator dated April 5, 2019, authorization for treatment for the left elbow was denied upon a finding that the left elbow injury is not a compensable diagnosis in the claim. Mr. Smith protested the claims administrator's decision.

Mr. Smith returned to the Orthopaedic Clinic on May 1, 2019, with a chief complaint of right elbow avulsion fracture. He underwent right elbow x-rays which showed no acute abnormality and no change from the prior study. The assessments were medial epicondylitis of the right elbow, biceps tendinitis of the right upper extremity, tendinitis of the right triceps, lateral epicondylitis of both elbows, and numbness and tingling in both hands. Mr. Smith was given an order for a TENS unit, and he was to continue physical therapy. In an Attending Physician's Report, it was stated that Mr. Smith is not at maximum medical improvement. The anticipated maximum medical improvement date was unknown.

Prasadarao Mukkamala, M.D., examined Mr. Smith on May 22, 2019. He reported that his low back injury had resolved completely, and his only complaint was diffuse tenderness in both elbows. Mr. Smith's hip examination was completely normal, with normal range of motion and no deformity or instability. Dr. Mukkamala noted a Z-shaped scar on the lower part of Mr. Smith's right arm, running across the anterior aspect of his elbow, and extending to the upper part of his forearm. When asked about the scar, Mr. Smith stated that it resulted from a laceration injury he suffered over twenty years ago. Although Dr. Mukkamala stated that Mr. Smith had significant symptoms with relation to his bilateral elbows, he noted that an evaluation of Mr. Smith's elbows was difficult due to symptom magnification. Dr. Mukkamala concluded that Mr. Smith's compensable low back and right hip strains had reached maximum medical improvement. He concluded that Mr. Smith had not reached maximum medical improvement with relation to injury to the right elbow and left elbow.

Mr. Smith returned to the Orthopaedic Clinic on May 29, 2019, with complaints of elbow pain. He reported intermittent aching pain with numbness and tingling in his right arm. The assessments were medial epicondylitis of the right elbow, biceps tendinitis of the right upper extremity, tendinitis of right triceps, and numbness and tingling in both hands. An EMG was going to be requested for further evaluation of the numbness and tingling. A request for authorization was prepared by Ms. Slider and Mr. Nelson for a bilateral NCS/EMG of Mr. Smith's upper extremity for the associated diagnosis of numbness and tingling in the right hand. By Order of the claims administrator dated June 7, 2019, the requests regarding authorization for

NCS/EMG of the right elbow and a TENS unit was denied as the diagnoses given are not compensable conditions in the claim. Mr. Smith protested the claim's administrator's Order.

The claims administrator issued a second Order on June 7, 2019, suspending temporary total disability benefits based upon the May 29, 2019, report from United Hospital Center stating that Mr. Smith had reached maximum medical improvement. The claims administrator issued a corrected Order dated June 12, 2019, suspending Mr. Smith's temporary total disability benefits based upon a May 23, 2019, report of Dr. Mukkamala. By claims administrator's Order dated July 18, 2019, Mr. Smith's claim was ordered closed for temporary total disability benefits. Mr. Smith protested the claims administrator's Order.

Mr. Smith testified at a deposition held on August 4, 2019, that on February 7, 2019, he fell hard on the ground after his feet flew out from underneath him on top of a big pile of concrete. He hit his whole backside, elbows, back, ribs and legs. He eventually had to seek treatment for his elbows because he had developed issues with range of motion and pain. Mr. Smith stated that he did not have pain and range of motion issues before the injury of February 7, 2019

A Diagnosis Update was prepared on August 16, 2019, by Mr. Nelson. The diagnoses listed were medial epicondylitis of the right elbow, lateral epicondylitis of both elbows, and numbness and tingling in both hands. It was stated that Mr. Smith was sent for an EMG test which showed moderate bilateral carpal tunnel at his wrist, and no evidence of ulnar neuropathy. By Order of the claims administrator dated August 27, 2019, the claim was accepted for the conditions of strain of muscle, fascia, and tendon of lower back and strain of muscle, fascia, and tendon of right hip. The following conditions were denied: medial epicondylitis, left elbow; lateral epicondylitis, right elbow; lateral epicondylitis, left elbow; and numbness and tingling in both hands. The claims administrator stated that the claim is in litigation regarding denial of authorization for the treatment of the elbow and denial of the request for an NCS/EMG for the elbow. Mr. Smith protested the claims administrator's Order.

A supplemental report prepared by Dr. Mukkamala dated November 19, 2019, was submitted to address Mr. Nelson's Diagnosis Update request. Dr. Mukkamala noted that the initial medical records following the date of injury in this claim document no abnormal physical findings with relation to Mr. Smith elbows. It was indicated that Mr. Smith may have had some minor injury to the right elbow in the form of a minor contusion, which would have cleared immediately. However, Dr. Mukkamala was of the opinion that there was no credible objective medical evidence that Mr. Smith had any significant injury to the right upper extremity. Dr. Mukkamala stated that Mr. Smith's EMG documented moderate bilateral carpal tunnel syndrome at the wrist but no ulnar neuropathy. Dr. Mukkamala further opined that Mr. Smith's bilateral extremity symptoms were more likely caused by an injury that occurred twenty-five to thirty years prior and resulted in a scar to his right arm. Dr. Mukkamala concluded that the medial epicondylitis of the right elbow, lateral epicondylitis of the bilateral elbows, and numbness and tingling of the right hand are not the result of Mr. Smith's compensable injury of February 7, 2019.

In a Final Decision dated February 26, 2020, the Office of Judges affirmed all of the Orders issued by the claims administrator. The Office of Judges stated that based upon the preponderance of the evidence, Mr. Smith failed to show that he sustained the personal injuries of medial epicondylitis of the right elbow and lateral epicondylitis of both elbows. Mr. Smith also failed to show that the symptoms of numbness and tingling in both hands resulted from a specific diagnosis related to the occurrence on February 7, 2019. The Office of Judges further determined that Mr. Nelson, who submitted the Diagnosis Update request, did not provide persuasive evidence that the diagnoses he requested are related to Mr. Smith's compensable injury. Accordingly, the August 27, 2019, claims administrator Order was affirmed.

Regarding the treatment issues on appeal, the Office of Judges determined that the evidence of record is not persuasive that Mr. Smith sustained an injury to his left elbow in this claim, and there has been no compensable diagnosis for the left elbow. Because the left elbow is not a compensable condition in the claim, the Office of Judges affirmed the April 5, 2019, Order of the claims administrator denying the authorization request from Bridgeport Express Care for treatment of the left elbow.

The Office of Judges also affirmed the June 7, 2019, Orders of the claims administrator denying a request for authorization of an NCS/EMG of the right elbow and authorization for a TENS unit, which denial was on the basis that the diagnoses given were not compensable conditions in the claim. The Office of Judges concluded that the preponderance of the evidence is insufficient to find that the diagnoses for the basis of the requests are compensable conditions in the claim.

Finally, the Office of Judges determined that Mr. Smith had reached his maximum degree of medical improvement for the compensable conditions in the claim. Mr. Smith protested the July 18, 2019, Order closing the claim for temporary total disability benefits. The claims administrator stated in the Order that additional evidence was not received to substantiate the continuation of benefits. Although Mr. Smith testified that he continues to experience pain and range of motion issues with his elbows and numbness and tingling in his hand, the Office of Judges noted that Dr. Mukkamala opined that he had reached maximum medical improvement for the accepted conditions in the claim. As such, the Office of Judges affirmed the claims administrator's Order dated July 18, 2019.

The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed the February 26, 2020, Final Decision. After review, we agree with the reasoning of the Office of Judges as affirmed by the Board of Review. Mr. Smith's claim was accepted for the conditions of strain of muscle, fascia, and tendon of the lower back and strain of muscle, fascia, and tendon of the right hip. The requested additional conditions were denied by the claims administrator. Mr. Smith has failed to show that his requests for treatment are for the accepted compensable conditions in the claim for which Dr. Mukkamala opined that he reached maximum medical improvement.

Affirmed.

ISSUED: February 25, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison

Justice Elizabeth D. Walker

Justice Tim Armstead

Justice William R. Wooton

Justice Alan D. Moats, sitting by temporary assignment.