

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

MURRAY AMERICAN ENERGY, INC.,
Employer Below, Petitioner

vs.) No. 21-0153 (BOR Appeal No. 2055701)
(Claim No. 2019001358)

RUSSELL JENKINS,
Claimant Below, Respondent

MEMORANDUM DECISION

Petitioner Murray American Energy, Inc., by Counsel Aimee M. Stern, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Russell Jenkins, by Counsel T. Colin Greene, filed a timely response.

The issues on appeal are medical benefits, additional compensable conditions, and temporary total disability benefits. The claims administrator denied authorization of Diclofenac, evaluation and treatment of the right shoulder, injections, diagnosis updates, and additional temporary total disability benefits on October 30, 2019. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the decision in its September 15, 2020, Order. The Order was reversed, in part, by the Board of Review on February 1, 2021. The Board of Review authorized Diclofenac and injections and granted temporary total disability benefits from December 12, 2018, through January 22, 2019. The remainder of the Office of Judges' Order was affirmed.

The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration. 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:

(c) 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

. . . .

(e) If the decision of the board effectively represents a reversal of a prior ruling of either the commission or 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 provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. The court may not conduct a de novo reweighing 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. Jenkins, a coal miner, completed an Employees' and Physicians' Report of Injury on July 15, 2018, indicating he injured his right shoulder while roof bolting at work the day prior. The physician's section was completed by Mark Coomes, M.D., at MedExpress, who diagnosed right shoulder sprain/strain. A July 15, 2018, treatment note from MedExpress indicates Mr. Jenkins injured his right shoulder at work. While using a pole, he felt a pop in his shoulder. Examination of the shoulders was normal. It was noted that he reported aching, pain, and difficulty lifting his arm above his head. Dr. Coomes diagnosed right shoulder joint sprain. Mr. Jenkins returned to Dr. Coomes on July 18, 2018. It was noted that Mr. Jenkins had no swelling but did have pain and limited range of motion. The diagnosis remained right shoulder sprain and physical therapy was recommended. The claim was held compensable for right shoulder strain on July 24, 2018, and temporary total disability benefits were granted from July 15, 2018, through August 1, 2018.

On July 31, 2018, David Hefner, D.O., with MedExpress, found that Mr. Jenkins had abnormal range of motion and pain in the right shoulder. He was diagnosed with right shoulder sprain. A right shoulder MRI was performed on August 3, 2018, and showed a small bone bruise but no soft tissue injury. Mr. Jenkins returned to MedExpress on August 28, 2018, and stated that he was ready to return to full duty work. He was to continue physical therapy. Mr. Jenkins was released to return to full duty. Temporary total disability benefits were suspended on August 30, 2018.

Prasadarao Mukkamala, M.D., performed an Independent Medical Evaluation on September 4, 2018, in which he noted that Mr. Jenkins reported right shoulder pain. Dr. Mukkamala found normal range of motion with the exception of mild limitation of internal

rotation. Dr. Mukkamala found that Mr. Jenkins had reached maximum medical improvement and required no further treatment.

Mr. Russel was seen at Dynamic Physical Therapy on September 20, 2018, for right shoulder pain and stiffness. He reported improvement in functioning and no pain with motion. He had achieved all goals and returned to work. Mr. Jenkins was discharged from physical therapy. The claim was closed for temporary total disability benefits on October 2, 2018.

On November 1, 2018, Mr. Jenkins sought treatment at MedExpress. He stated that he had again developed pain and limited range of motion in his right shoulder. Mr. Jenkins stated that the pain started the night before. He was diagnosed with right shoulder sprain and referred to orthopedics. He was unable to work. Mr. Jenkins returned to MedExpress on November 7, 2018, for pain and limited range of motion. He was diagnosed with right shoulder impingement syndrome. Mr. Jenkins was released to return to modified duty. On November 28, 2018, Mr. Jenkins reported increased range of motion difficulty. He was diagnosed with right shoulder joint sprain. Referral to orthopedics was recommended.

Mr. Russel was treated at UHC Orthopedic Clinic on December 12, 2018, for right shoulder pain due to his work injury. Mr. Jenkins stated that physical therapy helped slightly, but he felt the improvement was mostly from being off of work and resting his shoulder. He returned to work in September and was taken off again on November 1, 2018. Mr. Jenkins returned to work again on December 19, 2018. Mr. Jenkins reported that he had a steroid shot that offered no pain relief. It was noted that x-rays were negative, and an MRI showed no rotator cuff injuries. He was diagnosed with chronic right shoulder pain, right shoulder injury, right rotator cuff tendonitis, right shoulder impingement syndrome, bursitis, limited range of motion, and bone bruise of the right humeral head. A right subacromial injection was administered. Mr. Jenkins was to remain off of work until he was seen again. Mr. Jenkins returned on January 8, 2019, and reported some relief following the injection. Mr. Jenkins stated that he had not returned to work because his employer was unable to offer light duty. Mr. Jenkins stated that he still had pain over his anterior shoulder. A glenohumeral joint injection was recommended. Mr. Jenkins was to remain off of work until his next visit. He was prescribed Diclofenac. On January 22, 2019, Mr. Jenkins underwent a right glenohumeral joint injection. It was noted that the biceps long and short tendons were normal with no evidence of injury. On February 2, 2019, Mr. Jenkins returned to UHC Orthopedic Clinic and stated that Diclofenac provided a lot of pain relief. Mr. Jenkins stated that he had returned to work with no restrictions.

On April 16, 2019, the claims administrator acknowledged an April 11, 2019, Office of Judges Order and granted Mr. Jenkins temporary total disability benefits from November 1, 2018, through November 7, 2018. The claims administrator also acknowledged a December 3, 2018, Order of the Office of Judges and granted authorization for orthopedic consultation from April 16, 2019, to July 16, 2019.

Kayla Donoghue, PA-C, with UHC Orthopedic Clinic, requested authorization for Diclofenac, evaluation and treatment of right shoulder injury, right subacromial steroid injections, and glenohumeral joint injections on September 23, 2019, due to Mr. Jenkins's compensable

injury. In a September 23, 2019, Diagnosis Update, Ms. Donoghue listed the primary diagnosis as right shoulder injury and the secondary diagnoses as limited range of motion of the shoulder and glenoid labrum injury. Ms. Donoghue also completed an Attending Physicians' Report, report that day in which she opined that Mr. Jenkins would be temporarily and totally disabled from December 12, 2018, to January 28, 2019. He had reached maximum medical improvement. On October 30, 2019, the claims administrator denied authorization of Diclofenac, evaluation and treatment of the right shoulder, injections, diagnosis updates, and additional temporary total disability benefits.

Mr. Jenkins testified in a December 6, 2019, deposition that he initially returned to work on August 29, 2018. On September 14, 2018, he was found to be at maximum medical improvement by Dr. Mukkamala. Mr. Jenkins stated that he again sought treatment on November 1, 2018, because his shoulder began to hurt again. Mr. Jenkins stated that he sought treatment from Ms. Donoghue with his private insurance after a referral to orthopedics was denied. She recommended right shoulder steroid injections, which resolved his condition. He returned to work with full use of his right shoulder and no pain. Mr. Jenkins stated that he had not missed work due to the compensable injury since January 22, 2019.

In a February 8, 2020, supplemental report, Dr. Mukkamala stated that he had reviewed the additional records. He opined that the requested addition of right shoulder injury was already encompassed in the compensable right shoulder sprain. Dr. Mukkamala opined that Mr. Jenkins's right shoulder sprain resolved and the symptoms he developed in October of 2018 were not work-related. September 20, 2018, physical therapy treatment notes indicate Mr. Jenkins had no pain with motion or lifting. Dr. Mukkamala opined that the small bone bruise seen on a right shoulder MRI had fully healed. Dr. Mukkamala found that Mr. Jenkins reached maximum medical improvement in September of 2018. When he sought treatment on November 1, 2018, for recurrent shoulder pain, such treatment was not related to the compensable injury. Dr. Mukkamala disagreed with the diagnosis of right glenoid labrum because there was no evidence of a labrum injury. Dr. Mukkamala opined that the authorization of Diclofenac. He stated that the medication would have been appropriate for about a week following the compensable injury. Dr. Mukkamala opined that Mr. Jenkins should not receive temporary total disability benefits from December 12, 2018, through January 28, 2019, because there is no evidence that the period of disability is the result of the compensable injury. He concluded that Mr. Jenkins reached maximum medical improvement by September 4, 2018, for the compensable injury.

In its September 15, 2020, Order, the Office of Judges affirmed the claims administrator's decision denying authorization of Diclofenac, evaluation and treatment of the right shoulder, injections, diagnosis updates, and additional temporary total disability benefits. The Office of Judges first addressed the diagnosis update by Ms. Donoghue. The Office of Judges found that the diagnosis of right shoulder injury was unnecessary because the claim was already held compensable for right shoulder sprain. The Office of Judges agreed with Dr. Mukkamala that there is insufficient evidence of a glenoid labrum injury, and it should not be added to the claim. Regarding limited range of motion of the shoulder, the Office of Judges found that such is a symptom, not a diagnosis, and therefore cannot be added to the claim.

Regarding temporary total disability and the treatment requests, the Office of Judges found that the matter comes down to a disagreement between Dr. Mukkamala and Ms. Donoghue. The Office of Judges agreed with Dr. Mukkamala's finding that Mr. Jenkins reached maximum medical improvement in September of 2018. The Office of Judge found Dr. Mukkamala's opinion to be better supported by the evidentiary record. It noted that Ms. Donoghue's treatment notes contain few objective findings. Further, Ms. Donoghue is a PA-C, not a medical doctor. Dr. Mukkamala is a physician who sits on boards for physical medicine and rehabilitation, electrodiagnostic medicine, and pain management. The Office of Judges found Dr. Mukkamala's opinion to be more persuasive and affirmed the denials of the requested medical benefits and temporary total disability benefits.

The Board of Review reversed, in part, the Office of Judges decision on February 2, 2021. It found that Diclofenac, injections, and temporary total disability benefits should be granted. It noted that although Mr. Jenkins returned to work, his right shoulder symptoms returned and worsened. The claim was reopened for temporary total disability benefits on April 11, 2019, by the Office of Judges and benefits were granted from November 1, 2018, through November 7, 2018. An orthopedic consultation was also authorized. The decision was affirmed by the Board of Review and this Court. Mr. Jenkins had the orthopedic consultation and was treated by Ms. Donoghue. On December 12, 2018, she performed a subacromial steroid injection and opined that Mr. Jenkins should remain off of work until his next appointment. On January 8, 2019, she prescribed Diclofenac and a second injection and stated that Mr. Jenkins could not yet return to work. A glenohumeral joint injection was formed on January 22, 2019. On February 5, 2019, Mr. Jenkins returned to Ms. Donoghue and reported that his pain was gone, and he had returned to work. The Board of Review found that Diclofenac, subacromial steroid injection, and glenohumeral joint injection were reasonably required and necessary treatment for the compensable injury. The Board further concluded that Mr. Jenkins was temporarily and totally disabled from December 12, 2018, until he returned to work on January 22, 2019. The remainder of the Office of Judges' Order was affirmed.

After review, we agree with the reasoning and conclusions of the Board of Review. Though Mr. Jenkins returned to work following his finding of maximum medical improvement, his work duties caused his right shoulder symptoms to reappear and worsen. Mr. Russell received treatment in the form of injections and returned to work with no issues. He is entitled to temporary total disability benefits for the time period he was unable to work. The record also shows that the medication Diclofenac was appropriate, necessary treatment.

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton
Justice C. Haley Bunn