

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 7, 2015

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

REBECCA L. FAULKNER,
Claimant Below, Petitioner

vs.) **No. 15-0059** (BOR Appeal No. 2049607)
(Claim No. 2007219123)

WHEELING-NISSHIN, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Rebecca L. Faulkner, by M. Jane Glauser, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Wheeling-Nisshin, Inc., by Marion Ray, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 23, 2014, in which the Board affirmed a June 27, 2014, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's July 18, 2012, decision closing Ms. Faulkner's claim on a psychiatric permanent partial disability basis. Additionally, the Office of Judges affirmed the portion of a November 14, 2013, claims administrator's decision denying Ms. Faulkner's request to add a closed head injury as a compensable component of her claim. Further, the Office of Judges modified the portions of the November 14, 2013, claims administrator's decision denying Ms. Faulkner's request to add a thoracic spine injury as a compensable component of her claim and denying her request to reopen her claim for additional permanent partial disability benefits. The Office of Judges added a thoracic spine injury as a compensable component of the claim and reopened Ms. Faulkner's claim for further consideration of permanent partial disability benefits relating to the lumbar spine.¹ The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

¹ Neither Ms. Faulkner nor Wheeling-Nisshin, Inc., has appealed the decision to add a thoracic spine injury as a compensable component of the claim or the decision to reopen Ms. Faulkner's claim for further consideration of permanent partial disability benefits relating to the lumbar spine.

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.

Ms. Faulkner was injured on March 18, 2007, when she fell a distance of approximately twenty to twenty-five feet through an open trap door. When emergency transport personnel arrived at the scene, Ms. Faulkner reported that she did not experience a loss of consciousness. Ms. Faulkner was transported to the University of Pittsburgh Medical Center where she was diagnosed with an L1 vertebral compression fracture, which ultimately required treatment with a surgical spinal fusion, and a right ankle fracture. On March 27, 2007, Ms. Faulkner's claim was held compensable for a right ankle fracture and a vertebral fracture. Following the compensable injury, Ms. Faulkner received pain management care from Advanced Pain Management, and it was noted that Ms. Faulkner was experiencing ongoing thoracic and lumbar pain with radiation into the left leg.

On August 29, 2008, Joseph Grady II, M.D., performed an independent medical evaluation. He opined that Ms. Faulkner has reached maximum medical improvement in relation to the compensable injury. He further opined that Ms. Faulkner sustained 0% whole person impairment as a result of the right ankle fracture and, after placing Ms. Faulkner in Lumbar Category IV of West Virginia Code of State Rules § 85-20-Table C (2006), opined that she sustained 23% whole person impairment as a result of her compensable lumbar spine injuries. On September 22, 2008, the claims administrator granted Ms. Faulkner a 23% permanent partial disability award based upon Dr. Grady's independent medical evaluation.

On March 5, 2009, Jessica Shemm, M.D., and Brian Quigley, M.D., performed a psychiatric independent medical evaluation and diagnosed Ms. Faulkner with depressive disorder, not otherwise specified. Drs. Shemm and Quigley opined that Ms. Faulkner sustained 2% whole person impairment as a result of depression arising from the compensable injury. Major depressive disorder was added as a compensable component of the claim on August 14, 2009. On September 30, 2009, James Peykanu, M.D., and Cheryl Hill, M.D., performed a psychiatric independent medical evaluation. Drs. Peykanu and Hill opined that Ms. Faulkner sustained 5% whole person impairment as a result of major depressive disorder exacerbated by the compensable injury. On November 24, 2009, the claims administrator granted Ms. Faulkner a 5% psychiatric permanent partial disability award, which was later affirmed by the Office of Judges.

On June 11, 2012, Stuart Burstein, M.D., performed a psychiatric evaluation pursuant to a request that he determine whether Ms. Faulkner's diagnosis of major depression is continuing to cause symptoms. He opined that Ms. Faulkner's medical record clearly establishes that her diagnosis of major depressive disorder was pre-existing, and further opined that the exacerbation of her major depressive disorder attributable to the compensable injury has fully resolved. On

July 18, 2012, the claims administrator closed Ms. Faulkner's claim on a psychiatric permanent partial disability basis.

On September 19, 2013, Bruce Guberman, M.D., performed an independent medical evaluation. He noted that Ms. Faulkner reported striking her head on a light switch as she fell on March 18, 2007, and further noted that Ms. Faulkner reported losing consciousness for an unknown period of time. He opined that Ms. Faulkner sustained 0% whole person impairment as a result of the right ankle fracture and, after placing Ms. Faulkner in Lumbar Category V of West Virginia Code of State Rules § 85-20-Table C, opined that she sustained 25% whole person impairment as a result of the compensable lumbar spine injury.

On September 23, 2013, Anna Allen, M.D., examined Ms. Faulkner. Dr. Allen opined that she could offer Ms. Faulkner no additional treatment. Further, she opined that the medical evidence of record regarding Ms. Faulkner's assertion that she lost consciousness and sustained a head injury on March 18, 2007, is conflicting. On November 14, 2013, the claims administrator denied Ms. Faulkner's request to add a closed head injury and a thoracic spine injury as compensable components of the claim, and also denied Ms. Faulkner's request to reopen her claim for further consideration of additional permanent partial disability benefits.

The Office of Judges affirmed the July 18, 2012, claims administrator's decision closing Ms. Faulkner's claim on a psychiatric permanent partial disability basis. Further, the Office of Judges affirmed the portion of the November 14, 2013, claims administrator's decision denying Ms. Faulkner's request to add a closed head injury as a compensable component of the claim. The Office of Judges modified the remainder of the November 14, 2013, claims administrator's decision to reflect that a thoracic spine injury is a compensable component of the claim and that the claim should be reopened on a permanent partial disability basis regarding the lumbar spine. The Board of Review affirmed the reasoning and conclusions of the Office of Judges in its decision dated December 23, 2014.

Neither Ms. Faulkner nor Wheeling-Nisshin, Inc., has appealed the addition of the thoracic spine as a compensable component of the claim or the reopening of the claim on a permanent partial disability basis relating to the lumbar spine. Regarding the request to add a closed head injury as a compensable component of the claim, the Office of Judges found that Ms. Faulkner has failed to establish that she sustained a closed head injury on March 18, 2007. The Office of Judges agreed with Dr. Allen's assessment that the record contains conflicting documentation regarding whether Ms. Faulkner lost consciousness or sustained a head injury on March 18, 2007. The Office of Judges noted that treatment notes from the date of injury indicate that Ms. Faulkner did not lose consciousness. However, Ms. Faulkner later reported losing consciousness and sustaining a concussion. As was noted by the Office of Judges, in making her argument that a closed head injury should be added as a compensable component of the claim, Ms. Faulkner relies primarily on a diagnosis review sheet completed on March 22, 2007, while she was hospitalized at the University of Pittsburgh Medical Center, listing a closed head injury with loss of consciousness as her primary diagnosis. However, the Office of Judges found that of the voluminous medical record detailing her treatment at the University of Pittsburgh Medical Center, only the March 22, 2007, diagnosis review sheet mentions that Ms. Faulkner sustained a

closed head injury. Additionally, the Office of Judges noted that only Dr. Guberman reported that Ms. Faulkner mentioned striking her head when she fell on March 18, 2007. Finally, the Office of Judges noted that in a prior decision dated May 17, 2013, it denied a request for authorization of an MRI of the brain based upon a finding that there is a lack of evidence connecting the requested MRI to the March 18, 2007, injury. We agree with the reasoning and conclusions of the Office of Judges, as affirmed by the Board of Review, regarding the denial of Ms. Faulkner's request to add a closed head injury as a compensable component of the claim.

Ms. Faulkner asserts that she is appealing the affirmation of the July 18, 2012, claims administrator's decision. In her appellate brief, Ms. Faulkner references the July 18, 2012, claims administrator's decision as a denial of a request to reopen her claim for additional permanent partial disability benefits. However, the evidentiary record clearly indicates that the July 18, 2012, claims administrator's decision was a closure of Ms. Faulkner's claim on a psychiatric permanent partial disability basis pursuant to Dr. Burstein's report indicating that Ms. Faulkner's compensable major depressive disorder has resolved. Ms. Faulkner failed to submit any evidence or provide an argument addressing the actual subject matter of the claims administrator's July 18, 2012, decision. Instead, Ms. Faulkner seemingly does argue that the claims administrator erred in failing to reopen her claim for permanent partial disability benefits relating to an alleged head injury in its July 18, 2012, decision. However, as of July 18, 2012, the claims administrator had not ruled on the compensability of the alleged closed head injury, and therefore could not possibly have reopened the claim for a determination of permanent impairment regarding that diagnosis. Moreover, because a closed head injury is not a compensable component of the instant claim, Ms. Faulkner is not entitled to a permanent partial disability award for that diagnosis.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: October 7, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Allen H. Loughry II