

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JASON A. BARONE,
Claimant Below, Petitioner

vs.) **No. 15-0731** (BOR Appeal No. 2050121)
(Claim No. 2011035031)

WEST VIRGINIA DIVISION OF HIGHWAYS,
Employer Below, Respondent

FILED
June 14, 2016
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jason A. Barone, by William C. Gallagher, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. West Virginia Division of Highways, by Matthew L. Williams, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated July 1, 2015, in which the Board affirmed a December 15, 2014, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 22, 2014, decision denying a surgical consultation. 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, 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.

Mr. Barone, a transportation worker, was injured in the course of his employment on April 25, 2011, while changing the hitch on a trailer. The claim was held compensable for displacement of lumbar intervertebral disc and lumbar sprain. Mr. Barone eventually underwent an L5-S1 microdiscectomy.

Mr. Barone had a history of lower back pain prior to the compensable injury. In December of 2002, he reported to Monongalia General Hospital that he believed he pulled a muscle in his right lower back while lifting boxes at work. He was diagnosed with a lumbar

strain. In March of 2004, Mr. Barone was treated for lower back pain that radiated into his legs and shoulders and was again diagnosed with a lumbar sprain. Mr. Barone was treated for a lumbar sprain again in December of 2004 after bending over at work and in May of 2006 with no injury. On May 30, 2010, Mr. Barone was treated at Total Family Healthcare lower right side back pain. He also had numbness and pain in his left leg.

Mr. Barone was treated by Russell Biundo, M.D., for the compensable injury. On April 20, 2012, he reported that he developed pain and discomfort across most of his lumbosacral spine. Dr. Biundo opined that Mr. Barone had lumbosacral disease most consistent with lumbosacral articular facet disease, probably caused by the L5-S1 discectomy. Dr. Biundo recommended therapeutic exercise. He stated that he observed no radicular pain or evidence of an acute herniated disc. Sushil Sethi, M.D., performed an independent medical evaluation on May 11, 2012. At that time, Mr. Barone reported that he felt much better and no longer experienced pain in his legs. Dr. Sethi noted that he had undergone surgery and physical therapy. Dr. Sethi found that he had reached maximum medical improvement and assessed 10% whole person impairment.

A November 26, 2013, treatment note by Dr. Biundo indicates Mr. Barone had experienced low back pain radiating into his right leg without injury for the past two weeks. Dr. Biundo opined that there was evidence of a recurrent herniated disc, probably at L5-S1. He recommended an MRI. On December 9, 2013, Dr. Biundo asserted in a claim reopening application that Mr. Barone suffered from a herniated disc, lower back pain, and radicular pain. He recommended a surgical consultation and noted an aggravation of the compensable herniated disc.

Randall Short, D.O., reviewed the case and recommended in a January 10, 2014, physician review that the request to reopen the claim for a surgical consultation for a recurrent herniated disc be denied. He found that Mr. Barone underwent a successful surgery to treat a herniated L5-S1 disc. Follow up with Dr. Biundo revealed no evidence of radiculopathy or a herniated disc in April of 2012. Dr. Short stated that in November of 2013, Mr. Barone was reevaluated for low back pain with radiation into the right leg. Further, following the initial injury, he had radiculopathy on the left side. Dr. Short opined that the current symptoms are not related to the compensable herniated disc because they involve the opposite lower extremity.

The claims administrator denied a surgical consultation on April 22, 2014. The Office of Judges affirmed the decision in its December 15, 2014, Order. It found that Mr. Barone has a history of lower back pain dating to 2002. The Office of Judges noted that the claim was held compensable for displacement of lumbar intervertebral disc and that Mr. Barone underwent an L5-S1 microdiscectomy to treat radiation of pain into his left leg caused by the compensable injury. An MRI taken on May 20, 2012, noted post-surgical scarring changes on the left at L5-S1, which may be impinging on the nerve roots. The Office of Judges determined that Dr. Biundo's November 26, 2013, report notes evidence of a recurrent herniated disc, probably at L5-S1, but the report does not directly relate it to the compensable injury. The Office of Judges found that it was not until the December of 2013 reopening application that Dr. Biundo opined that Mr. Barone had suffered an aggravation of the compensable injury. The Office of Judges

determined that Dr. Short reiterated that the compensable injury caused a herniated disc at L5-S1 on the left, causing radicular pain on the left. Mr. Barone's current symptoms are in his right leg. The Office of Judges concluded that Dr. Biundo failed to explain how the compensable left-sided herniated disc is now causing right sided symptoms. The Office of Judges therefore held that the record was not sufficient to authorize the requested surgical consultation. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on July 1, 2015.

After review, we agree with the reasoning of the Office of Judges and conclusions of the Board of Review. Mr. Barone sustained a compensable left-sided L5-S1 herniation in the course of his employment for which he was treated with medication and surgery. His symptoms appear to have resolved until November of 2013, when he reported lower back pain radiating into his right extremity. Mr. Barone has a long history of lower back pain prior to the compensable injury, including radiculopathy into his legs. Further, Dr. Biundo's reopening request failed to explain how the compensable left-sided herniated disc is now causing right-sided symptoms.

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: June 14, 2016

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Allen H. Loughry II