

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**MURRAY AMERICAN ENERGY, INC.,
Employer Below, Petitioner**

vs.) No. 18-0374 (BOR Appeal No. 2052290)
(Claim No. 2015033220)

**MICHAEL KELLER,
Claimant Below, Respondent**

**FILED
November 15, 2018**

EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Murray American Energy, Inc., by Denise D. Pentino and Aimee M. Stern, its attorneys, appeals the decision of the West Virginia Workers' Compensation Board of Review. Michael Keller, by M. Jane Glauser, its attorney, filed a timely response.

The issue on appeal is vocational rehabilitation benefits. The claims administrator closed the claim for vocational rehabilitation services on May 8, 2017. The Office of Judges reversed the decision in its October 30, 2017, Order and ordered that the claim remain open for vocational rehabilitation services and that temporary total disability benefits be paid until completion of the rehabilitation plan. The Order was affirmed by the Board of Review on March 26, 2018. 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. Keller, a coal miner, injured his right shoulder and back while pulling on hoses in the course of his employment on June 3, 2015. The claim was held compensable for sprain of unspecified site of shoulder and upper arm and thoracic sprain. On September 2, 2015, Allan Tissenbaum, M.D., performed surgical arthroscopy, debridement of chondral damage, debridement of biceps, and open subscapularis repair on the right shoulder. The postoperative

diagnosis was right subscapularis tendon tear and partial thickness rotator cuff tear. It was noted that there was anterior scarring and chondral damage.

Dr. Tissenbaum treated Mr. Keller for postoperative right shoulder pain on December 4, 2015. Physical therapy was recommended. On January 15, 2016, he was seen for follow up and it was noted that his right shoulder was not improving. Mr. Keller returned to Dr. Tissenbaum on February 19, 2016, at which time it was noted that he had undergone an MRI that showed traumatic injury of the subscapularis tendon. Dr. Tissenbaum stated that it was either recurrent or never healed properly. He recommended another repair which was performed on April 5, 2016. The postoperative diagnosis was right subscapular tear and biceps tear.

Mr. Keller underwent physical and occupational therapy which C. Clark Miller, D.O., noted provided little improvement on July 22, 2016. Joseph Grady, M.D., performed an independent medical evaluation on September 8, 2016, in which he diagnosed status post right shoulder surgery for rotator cuff tears and humeral head chondral injury with biceps injury and debridement. He assessed 6% whole person impairment. The claims administrator suspended temporary total disability benefits on September 16, 2016, based on Dr. Grady's report.

Based on Dr. Milton's recommendation, the claims administrator referred Mr. Keller for rehabilitation evaluation. It stated that if he would benefit from such services, it authorized twenty hours of plan development. On November 2, 2016, Erin Saniga, M.Ed., CRC, LPC, prepared a rehabilitation plan. Mr. Keller was to undergo a functional capacity evaluation and be paid rehabilitation temporary total disability benefits until December 9, 2016. The purpose of the functional capacity evaluation was to determine if Mr. Keller would benefit from rehabilitation services.

In an initial vocational report dated November 28, 2016, Ms. Saniga stated that the goal of rehabilitation was to return Mr. Keller to work in an appropriate position. His target return to work date was January of 2017. Curt Neel, PT, performed a functional capacity evaluation on December 1, 2016, and noted that Mr. Keller gave maximum effort on all tests. His physical limitations were found to prevent him from returning to work unless modifications to his job duties could be made. Mr. Neel found no appropriate job matches.

On December 15, 2016, the claims administrator approved vocational rehabilitation benefits from December 10, 2016, through January 8, 2017. Vocational rehabilitation services notes from Allegiant Managed Care indicate Mr. Keller was to complete vocational exploration, a functional capacity evaluation, and job retention training. On December 26, 2016, the goal was to return to work for the same employer but in a different position. By January 26, 2017, the goal was to return to work with a different employer. A closure report dated April 19, 2017, indicates that no further services were recommended. Mr. Keller was determined to be capable of seeking and applying for employment on his own. No formal training to be reemployed was recommended.

In a December 15, 2016, disability status form completed by Ross Tennant, NP-C, it was stated that Mr. Keller could return to work with restrictions. He could carry no more than twenty-

five pounds and he could not crawl. The claims administrator suspended vocational rehabilitation benefits because the ninety days of job searching ended on April 8, 2017. The claim was closed to vocational rehabilitation benefits on May 8, 2017.

Christi Cooper-Lehki, D.O., performed a psychiatric independent medical evaluation and Christina Wilson, psychologist performed a psychological evaluation on April 19, 2017. Dr. Cooper-Lehki opined that Mr. Keller had panic disorder and major depressive disorder. She stated that the panic disorder developed long before the compensable injury. She opined that the major depressive disorder is a result of the compensable injury. However, she noted that he probably had depression as an adolescent based on his two psychiatric hospitalizations and the number of antidepressants he has taken over the years. Dr. Cooper-Lehki noted that Mr. Keller had a below average IQ, which limits his work opportunities when combined with his physical limitations. These were factors that contribute to his depression and anxiety.

Michael Myers, M.D., evaluated Mr. Keller on May 31, 2017, and opined after viewing the MRI that it was unlikely that he could repair Mr. Keller's subscapularis without an allograft tissue. He stated that he could not give any guarantees with that surgery and recommended pain management evaluation. Dr. Myers opined that the radicular symptoms were likely a neurological complication from prior shoulder surgeries. He requested Mr. Keller be referred for pain management evaluation.

In an August 28, 2017, letter, Ms. Saniga opined that Mr. Keller was employable, that he had the skills necessary to seek and apply for employment, and that he did not require formal training. She also found that there was suitable employment available to him in his labor market. File closure was recommended as Mr. Keller no longer required assistance.

On October 30, 2017, the Office of Judges reversed the claims administrator's closure of the claim for vocational rehabilitation services. It ordered that the claim remain open for vocational rehabilitation services and that the claims administrator formulate a plan for rehabilitation. It also ordered that temporary total disability benefits be paid until completion of the rehabilitation plan or rejection of the plan by Mr. Keller.

The Office of Judges found that Mr. Keller's return to work priority hierarchy level, set forth in West Virginia Code of State Rules §85-15-4 (2006), when the claim was closed for vocational rehabilitation services, was Level 5, which means the goal was to return him to work in a new position with a new employer. Level 6 is return to employment with a new employer and on the job training. However, Level 6 was not recommended as Ms. Saniga recommended in her vocational rehabilitation closure report that no further services be provided. In her report, Ms. Saniga noted that Mr. Keller participated in ninety days of job searching. She stated that he was provided with assistance searching for jobs, applying for jobs, and determining which jobs met his qualifications. He was given feedback when he chose inappropriate positions. He was also given an updated resume. After the ninety-day job search, it was Ms. Saniga's opinion that Mr. Keller had developed the necessary skills to look for employment on his own. She also opined that he did not need formal training to obtain a new job. She found appropriate employment available in his labor market.

The Office of Judges found Ms. Saniga's opinion to be unpersuasive as no explanation was provided regarding why Level 5 of the hierarchy of employment was not successful. Though employment through vocational services is not guaranteed, the Office of Judges decided that a reasonable explanation as to why the level did not result in employment should have been provided. Ms. Saniga merely stated that Mr. Keller was employable. Given that he did not find employment, the Office of Judges concluded that there must be a barrier to his finding employment, and Level 6 employment with a new employer and on the job training should be explored. The Office of Judges also found that Mr. Keller was compliant with the rehabilitation services plan. Because the hierarchy is so specific, and compliance is required, the Office of Judges stated that Ms. Saniga should have considered Level 6 and provided an explanation of why it was not necessary for Mr. Keller. It therefore concluded that the claim should remain open for vocational rehabilitation services. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on March 26, 2018.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. The record indicates Mr. Keller participated in vocational rehabilitation services and followed all required steps in his plan. Ms. Saniga opined that he was employable, that he had been searching for jobs, and that there were jobs available in his labor market. However, she provided no explanation of why Mr. Keller had not found a job. It was not unreasonable for the Office of Judges to determine that the claim should remain open for further vocational services as Ms. Saniga provided no explanation for the failure of the current vocational rehabilitation plan to help Mr. Keller secure employment.

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: November 15, 2018

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice Paul T. Farrell sitting by temporary assignment

DISSENTING:

Justice Evan H. Jenkins