

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

September 13, 2019
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

vs.) **No. 18-0738** (BOR Appeal No. 2052530)
(Claim No. 2017008629)

**STEVEN EYE,
Claimant Below, Respondent**

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. Steven Eye, by Robert L. Stultz, his attorney, filed a timely response.

The issues on appeal are medical benefits and temporary total disability benefits. The claims administrator denied a referral to a pain management clinic on June 23, 2017. On August 2, 2017, it closed the claim for temporary total disability benefits. The Office of Judges reversed the decisions in its January 31, 2018, Order, granted a referral to a pain clinic, and granted temporary total disability benefits from July 14, 2017, to September 14, 2017. The Order was affirmed by the Board of Review on July 27, 2018.

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.

Mr. Eye, a coal miner, injured his lower back in the course of his employment on September 22, 2016. The Employees' and Physicians' Report of Injury was completed on October 3, 2016, and indicates Mr. Eye injured his right lower back while lifting a side cover on a bulldozer. He was treated at United Hospital Center and diagnosed with a low back strain. He reported that he had a sudden onset of sharp pain and had experienced similar symptoms in the past. Lumbar x-rays showed mild multilevel degenerative endplate osteophyte formations. There were mild degenerative changes in the lower lumbar region. He was diagnosed with lower back pain.

Mr. Eye sought treatment from Russell Biundo, M.D., on October 10, 2016, for low back pain that radiated into the left leg, right hip pain, and left leg numbness. He was referred for an MRI and x-rays of the hips and pelvis. The MRI was completed on November 2, 2016, and showed multilevel degenerative changes and disc space disease, a small disc herniation at T12-L1, and a large herniation with a free fragment at L3-4. The claim was held compensable for strain of muscle, fascia, and tendon of the lower back. Temporary total disability benefits were granted from October 1, 2016, through October 31, 2016.

Mr. Eye underwent a lumbar epidural steroid injection for a herniated lumbar disc and lumbar spinal stenosis on November 29, 2016. He returned to Dr. Biundo on January 24, 2017, and reported some symptom relief from the epidural steroid injections. He was referred to physical therapy. David Soulsby, M.D., performed an independent medical evaluation on February 21, 2017, in which he diagnosed a herniated L3-4 disc. He found that Mr. Eye had not yet reached maximum medical improvement and opined that a lumbar laminectomy is the reasonable next step.

On March 10, 2017, Dr. Biundo noted that Mr. Eye reported constant pain and some right leg weakness. He referred Mr. Eye for another MRI and to a neurosurgeon. Bill Underwood, M.D., a neurosurgeon, saw Mr. Eye for low back pain, right leg pain, neuropathy, and numbness of the left leg on March 27, 2017. He diagnosed lumbar disc herniation, right leg weakness, and lumbar stenosis and referred Mr. Eye for an MRI. The MRI was performed on March 28, 2017, and showed facet arthropathy and a disc bulge at L4-5 with mild bilateral foraminal narrowing and epidural lipomatosis. At L5-S1 there was anterolisthesis due to bilateral spondylothesis, a disc bulge, and moderate bilateral foraminal narrowing. At L2 there was a new disc herniation with extra nerve root impingement on the right side.

An April 3, 2017, treatment note by Dr. Underwood indicates Mr. Eye reported constant pain in his lumbar spine that radiates down the right leg and into the right groin. He also had numbness in the left leg and tingling in two toes. Dr. Underwood diagnosed lumbar disc herniation, lumbar radiculopathy, leg pain, and leg weakness. He recommended nerve blocks and physical therapy. He also recommended weight reduction to a body mass index under forty so Mr. Eye could be considered for surgery. Dr. Biundo saw Mr. Eye for follow up and recommended nonsurgical management on May 11, 2017. On June 7, 2017, he requested a consultation for Mr. Eye with pain management. The claims administrator denied the request on June 23, 2017.

Dr. Soulsby performed an independent medical evaluation on June 13, 2017, in which he found that Mr. Eye had not reached maximum medical improvement. He noted that surgical intervention was on hold at the present time until he could lose some weight. Dr. Soulsby stated that he still believed Mr. Eye would benefit from surgical decompression of his herniated disc.

Mr. Eye returned to Dr. Biundo on July 14, 2017, for low back pain, lumbar spondylosis, and lumbar stenosis. Dr. Biundo noted that medial branch block testing/RFA was denied due to weight issues. Dr. Biundo also completed an Attending Physician's Report in which he stated that Mr. Eye was temporarily and totally disabled from July 14, 2017, to September 14, 2017. The claims administrator closed the claim for temporary total disability benefits on August 2, 2017.

In a September 29, 2017, addendum to his evaluation, Dr. Soulsby stated that if Dr. Underwood would not perform surgery due to Mr. Eye's weight, then he could be considered to be at maximum medical improvement because no other treatment is available. However, he also noted that since July 14, 2017, Mr. Eye had begun to lose weight and was making excellent progress. Dr. Soulsby opined that he would be at a body mass index under forty and a weight appropriate for surgery in four to six weeks if he continued his current weight loss regiment.

Mr. Eye testified in a deposition on September 29, 2017, that he tried epidural injections, physical therapy, and nerve blocks. He still experiences some pain in his right leg and pelvis. He also has pain in his left leg and thigh with burning sensations in his calf. He stated that he sustained a back sprain in 2012 but recovered fully without treatment. Mr. Eye testified that his body mass index was currently 42.38 and he was still attempting to lose weight but the process was slow.

The Office of Judges reversed the claims administrator's decisions in its January 31, 2018, Order. It found that the claims administrator's June 23, 2017, denial of the request for a referral to pain management was based upon incorrect reasoning. Specifically, the claims administrator stated that its decision was based upon Dr. Soulsby's May 11, 2017, independent medical evaluation which stated that Mr. Eye had reached maximum medical improvement. However, the Office of Judges found in reviewing the evaluation that Dr. Soulsby stated that Mr. Eye had not reached maximum medical improvement and that he would benefit from surgery. Dr. Soulsby later stated in his September 29, 2017, addendum that if Dr. Underwood would not perform surgery due to Mr. Eye's weight, Mr. Eye would be at maximum medical improvement. However, he further noted that Mr. Eye had made excellent progress in his weight loss and should be at a weight appropriate for surgery in four to six weeks.

The Office of Judges further found that the claims administrator's August 2, 2017, decision closing the claim for temporary total disability benefits was also based upon a faulty premise. The claims administrator stated in its decision that additional evidence of temporary total disability had not been received. However, the July 14, 2017, Attending Physician's Report shows that Dr. Biundo stated Mr. Eye was temporarily and totally disabled from July 14, 2017, through September 14, 2017, and the report indicates it was faxed to the claims administrator. The Office of Judges concluded that since the claims administrator's decisions were based on faulty reasoning, they should not be affirmed. It further noted that the record shows Mr. Eye continues to suffer from low back pain and leg pain that is due, at least in part, to his herniated disc. It therefore granted a referral to a pain clinic and temporary total disability benefits from July 14, 2017, through September 14, 2017, and further as substantiated by medical evidence. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on July 27, 2018.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Pursuant to West Virginia Code § 23-4-7a (2018), temporary total disability benefits will cease when the claimant has reached maximum medical improvement, has been released to return to work, or has returned to work, whichever occurs first. There is no indication that any of these have occurred in this case. The only report of record to find that Mr.

Eye reached maximum medical improvement was the addendum of Dr. Soulsby, which was completed after the claim administrator's decision. Dr. Soulsby stated in his report that if Dr. Underwood declined to perform surgery, there would be no more treatment options, and thus Mr. Eye would be at maximum medical improvement. However, Dr. Soulsby also noted that he was making excellent progress in his weight loss and should be a surgical candidate within four to six weeks. Further, the claims administrator denied medical benefits on the incorrect assumption that Mr. Eye had reached maximum medical improvement. A preponderance of the evidence shows that a referral to a pain clinic is medically related and reasonably required treatment for the compensable injury.

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: September 13, 2019

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker

Justice Margaret L. Workman

Justice Tim Armstead

Justice Evan H. Jenkins

Justice John A. Hutchison