

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Mark A. Hinson,
Claimant Below, Petitioner

vs.) **No. 21-0739** (BOR Appeal No. 2056371)
(Claim No. 2014004605)

Chicago Bridge & Iron Company,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Mark A. Hinson appeals the August 23, 2021, order of the West Virginia Workers' Compensation Board of Review ("Board of Review"), affirming the January 27, 2021, decision of the Workers' Compensation Office of Judges ("Office of Judges") affirming two claims administrator orders. The issue presented on appeal is Mr. Hinson's entitlement to temporary total disability benefits in the claim. In an order dated December 13, 2019, the claims administrator reinstated temporary total disability benefits as of November 14, 2019. In a second order issued July 17, 2020, the claims administrator closed the claim for temporary total disability benefits. Chicago Bridge & Iron Company filed a timely response.¹ Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the Board of Review is appropriate. *See* W. Va. R. App. P. 21.

Mark A. Hinson, a pipefitter, was injured on March 7, 2013, while changing gaskets on flanges, which required the removal of nuts with a thirty-two inch, fifteen pound wrench. He initially thought he was having a heart attack due to the pain in his chest, left arm, and neck. Mr. Hinson told his foreman about the pain, and his foreman took him to the safety office. In the safety office, Mr. Hinson spoke to the safety supervisor and the nurse. He rested in the safety office for about a half an hour and then went to the hospital. A chest x-ray, laboratory results, and EKG results all appeared normal.

On March 19, 2013, Mr. Hinson presented to New Martinsville Rural Health Clinic for a follow-up to his emergency room visit. Mr. Hinson complained of pain in his left shoulder which was constant but worsened with movement. He complained of numbness in his entire left arm and

¹ Petitioner Hinson is represented by Patrick K. Maroney, and Chicago Bridge & Iron Company is represented by Maureen Kowalski.

the tip of his thumb but stated that his hand was not numb. Mr. Hinson reported left-sided neck pain and that his left arm felt weak due to pain. The assessment was left shoulder pain. Mr. Hinson was given a note for work through April 9, 2013, that stated he could not climb ladders or push, pull, or reach above his head with his left upper extremity. X-rays taken the next day indicated that there were degenerative changes in the cervical spine. No fractures of the left shoulder were identified.

On April 3, 2013, Mr. Hinson underwent an MRI of his left shoulder which showed no rotator cuff tear. There was evidence of subacromial/subdeltoid bursitis and mild degenerative disease of the acromioclavicular joint. An MRI of the cervical spine showed a naturally small spinal canal with superimposed degenerative changes including subluxations and disc herniations resulting in mild to moderate spinal stenosis. There was fairly extensive foraminal stenosis from C4-T1. On October 8, 2014, an arthrogram and MRI of the left shoulder were performed. A superior labral tear from anterior to posterior and significant articular set rotator cuff tear were demonstrated.

On April 1, 2015, Paul Bachwitt, M.D., performed an independent medical evaluation. He opined that it was more likely than not that Mr. Hinson tore his left rotator cuff at work on March 7, 2013, and sustained a cervical spine sprain/strain. Dr. Bachwitt noted some of the tools Mr. Hinson worked with were quite large and that Mr. Hinson's foreman, Mr. Katherman, and welder, Brian Patrick, could verify that Mr. Hinson was injured at work while using a wrench. Dr. Bachwitt also reported that Mr. Hinson could have continued working after suffering a torn rotator cuff as not all rotator cuffs tears are complete tears, but it still needed to be repaired. Individuals who sustain a rotator cuff tear usually do not have a full recovery, but with the best of treatment, physical therapy, and home exercises, Dr. Bachwitt expected Mr. Hinson to make a good recovery. He opined that Mr. Hinson had not yet reached maximum medical improvement from the injury of March 7, 2013, and would not reach it until he undergoes additional physical therapy for the limitation of motion in his left shoulder and sees the neurosurgeon to determine whether cervical injections or a laminectomy are recommended.

Thomas Muzzonigro, M.D., performed a medical records review on May 28, 2015, and opined that Mr. Hinson had significant pre-existing conditions that included multilevel degenerative changes in the neck, mid back, and low back with stenosis of the cervical spine and prior injuries to his neck, shoulder, back, and chest. All were unrelated to the March 7, 2013, incident. Dr. Muzzonigro opined that if Mr. Hinson were an accurate historian, he may have sustained a mild cervical and left shoulder strain at work on March 7, 2013. At the time of the incident, x-rays showed only degenerative changes. An MRI of the cervical spine also showed no evidence of injury, but there was evidence of degenerative changes and stenosis. Dr. Muzzonigro did not believe the medical records showed an aggravation of a pre-existing condition. Nor did he believe that Mr. Hinson sustained a rotator cuff tear in the course of and resulting from his employment.

In a supplemental report by Dr. Muzzonigro dated July 8, 2015, it was stated that the arthroscopic repair of degenerative changes of Mr. Hinson's left shoulder was reasonable and related to the work injury. Dr. Muzzonigro added that the medical records supported a finding that

Mr. Hinson sustained a mild cervical and left shoulder strain at work. However, he said that sprains and strains of the musculoskeletal system typically heal within six to eight weeks, although sometimes the symptoms continue for weeks or months thereafter. Dr. Muzzonigro said that x-rays and MRIs contemporaneous with this injury showed no evidence of a rotator cuff tear or superior labrum from anterior to posterior (“SLAP”) tear. Dr. Muzzonigro felt that late treatment for a degenerative SLAP or rotator cuff tear was not directly related to the work injury.

In an order dated April 12, 2018, the claims administrator denied Mr. Hinson additional temporary total disability benefits. On that same date, Mr. Hinson submitted a Reopening Application completed by Jack F. Scheuer Jr., M.D., who indicated that he was unable to work due to neck pain requiring opiates. Dr. Scheurer opined that Mr. Hinson was temporarily disabled from March 7, 2013, to the current time. In his progress notes prepared on the same day, Dr. Scheurer assessed Mr. Hinson with rotator cuff syndrome of the right shoulder, hypertension, and cervical disc disease with myelopathy.

In a May 1, 2018, report, Dr. Muzzonigro found Mr. Hinson to be at maximum medical improvement for his shoulder and cervical injuries. Dr. Muzzonigro felt that he could perform light to medium duty work and did not need further active treatment for his shoulder or neck. A home exercise service was recommended. The treatment for degenerative arthritis and congenital stenosis in the cervical spine were found to be unrelated to the work injury.

In a Final Decision dated June 17, 2019, the Office of Judges reversed the April 12, 2018, claims administrator Order, which denied temporary total disability benefits. The Office of Judges held that Mr. Hinson is entitled to temporary total disability benefits from September 11, 2014, until May 26, 2015, when he was to complete physical therapy. It was stated that Mr. Hinson would still be eligible for additional benefits if he provided sufficient medical evidence to prove that he continued to be temporarily and totally disabled as a result of the compensable injuries in the claim.²

Mr. Hinson was evaluated by Dr. Bachwitt on November 13, 2019. Dr. Bachwitt found him to be at his maximum degree of medical improvement for his left shoulder. Dr. Bachwitt found that Mr. Hinson had not reached maximum medical improvement for his cervical spine injury. Dr. Bachwitt opined that Mr. Hinson needed a thorough evaluation by a neurosurgeon and possible injections for his cervical spine. Dr. Bachwitt stated that Mr. Hinson most likely aggravated the degenerative disc disease of the cervical spine while using his left arm to torque bolts with a large wrench. Dr. Bachwitt did not believe that Mr. Hinson could return to work until a formal neurosurgical treatment was completed, and he found 7% whole person impairment for the left shoulder. In an Order dated December 13, 2019, the claims administrator notified Mr. Hinson that a review of his file determined that he had been paid temporary total disability benefits from September 11, 2014, through May 26, 2015. After review, it was determined that temporary total

² The Office of Judges noted that this claim is complicated by the fact that it was not held compensable for over four years and that Mr. Hinson worked for over a year after the injury. The Office of Judges further noted that Mr. Hinson is not entitled to temporary total disability benefits during the time that he worked for any employer.

disability benefits should be reinstated as of November 14, 2019, because he was still temporarily disabled based on his cervical injury.

Mr. Hinson underwent an independent medical evaluation with Marsha Bailey, M.D., on June 25, 2020. Dr. Bailey opined that he has the diagnosis of chronic cervical pain with perhaps a mild left upper extremity cervical radiculitis expressed as numbness in the tip of his left thumb. Dr. Bailey was surprised by the bilaterality of Mr. Hinson's shoulder complaints because he reported pain on palpation of his uninjured right shoulder. His uninjured right shoulder range of motion measurements were pain restricted like his left shoulder range of motion measurements. Dr. Bailey stated that a reasonable person may conclude that at least a portion of Mr. Hinson's chronic left shoulder complaints were a result of the same nonoccupational conditions which caused pain and limited range of motion in his uninjured right shoulder. Dr. Bailey opined that Mr. Hinson reached his maximum medical improvement long ago and no further treatment of any kind is necessary to treat the injuries sustained on March 7, 2013. Using the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), Dr. Bailey placed Mr. Hinson in Category IIC of Table 75 for 6% impairment. No impairment was found for range of motion since all the movements were pain restricted. Dr. Bailey placed Mr. Hinson in Cervical Category II of Table 85-20-E for 6% impairment, which she apportioned entirely to preexisting conditions. She calculated a total of 7% whole person impairment for the left shoulder. When Dr. Bailey compared the left with the right, which had 4% impairment, she apportioned and found 3% for the left shoulder.

In an order dated July 17, 2020, the claims administrator granted Mr. Hinson a 13% permanent partial disability award based upon Dr. Bailey's report. In another order dated July 17, 2020, the claims administrator stated that Mr. Hinson had reached maximum medical improvement for his compensable conditions. The claims administrator's decision was based upon Dr. Bachwitt's November 3, 2019, report, and Dr. Bailey's June 25, 2020, report. Mr. Hinson's temporary total disability benefits were suspended, and he was notified that his claim would be closed unless he provided additional medical information to continue benefits. Mr. Hinson protested the claims administrator's order.

In a deposition transcript dated July 23, 2020, Mr. Hinson testified regarding the temporary total disability benefits paid from September 11, 2014, to May 26, 2015. He testified that he is also seeking temporary total disability benefits for May 26, 2015, until November 14, 2019, when the claim was closed after his evaluation with Dr. Bachwitt. Mr. Hinson asserted that he has not been able to work since May 2015, and he should be entitled to additional temporary total disability benefits from November 14, 2019, until the benefits stopped on February 20, 2020. Although he acknowledged having a past medical history of low back problems, Mr. Hinson stated that he does not have a history of issues with his neck.

In a decision dated January 27, 2021, the Office of Judges found that Mr. Hinson has not proven by a preponderance of the evidence that he was temporarily and totally disabled from May 26, 2015, through November 14, 2019. The Office of Judges reasoned that Dr. Bachwitt's report was likely why the claims administrator reinstated temporary total disability benefits as of November 14, 2019. However, the Office of Judges determined that Dr. Bachwitt's report does

not provide a basis for temporary total disability benefits prior to the November 13, 2019, date of his report. In light of Dr. Bailey's report dated June 25, 2020, which concluded that Mr. Hinson had reached maximum medical improvement from his compensable injury and that his chronic neck conditions were the source of his continuing symptoms and impairment, the Office of Judges held that Mr. Hinson has not proven that the claim was improperly closed for temporary total disability benefits. Accordingly, the claims administrator's order dated December 13, 2019, which denied temporary total disability benefits, was affirmed. On August 23, 2021, the Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its decision.

This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review, and when the Board's decision affirms prior rulings by both the Workers' Compensation Commission and the Office of Judges, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is based upon a material misstatement or mischaracterization of the evidentiary record. *See* W. Va. Code § 23-5-15(c) & (d). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. of Ins. Comm'r*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Although Mr. Hinson argues that he should be granted temporary total disability benefits from May 26, 2015, until November 14, 2019, based upon Dr. Bachwitt's examinations, the Office of Judges determined that medical records from that time period indicate that he was under medical treatment for solely noncompensable injuries. The record reflects that Mr. Hinson was being treated for multiple medical problems, such as low back pain, kidney stones, and hypertension. Because Mr. Hinson failed to provide documentation that he was temporarily and totally disabled due to the compensable injury for the requested period of time, the Board's order is affirmed.

Affirmed.

ISSUED: June 13, 2023

CONCURRED IN BY:

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