IN THE COURT OF APPEALS OF THE STATE OF NEVADA

YOLANDA HENDERSON,
Appellant,
vs.
CLARK COUNTY SCHOOL DISTRICT;
AND SIERRA NEVADA
ADMINISTRATORS,
Respondents.

No. 84385-COA

ORDER OF AFFIRMANCE

Yolanda Henderson appeals from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Henderson suffered an industrial injury in the course and scope of her employment as a bus driver while employed by respondent Clark County School District. During the course of her treatment, Henderson saw Dr. Kevin R. Sharif for a consultation regarding her cervical spine. In his report, Dr. Sharif noted that after four to six sessions of physical therapy, Henderson "will be considered to have reached" maximum medical improvement (MMI). Based on this report, Henderson sought approval for physical therapy and transfer of care to Dr. Sharif for further treatment of her cervical spine. Several weeks later, Henderson received a letter from her insurer, respondent Sierra Nevada Administrators (insurer), which stated that she had completed physical therapy and, based on Dr. Sharif's prior report, had reached MMI and did not require further treatment.

On September 30, 2020, Henderson underwent an independent medical examination (IME) with Dr. Rod Perry, who determined that no

further care for her cervical spine was necessary. A hearing officer subsequently affirmed the insurer's determination that she had reached MMI and that no additional treatment was required.

Henderson appealed that decision to an appeals officer. During the March 2021 hearing before the appeals officer, Henderson's counsel stated that he wanted to present Dr. Perry with additional medical records from Southwest Medical Associates that he did not review while conducting the IME in order to obtain a supplemental report regarding Henderson's need for additional care. The Southwest Medical records at issue were presented to the appeals officer and showed that, on three separate dates in September 2020, prior to her IME, Henderson sought treatment for pain in her cervical spine, among other things. There was some discussion about continuing the hearing, but the appeals officer stated he would review the records and weigh them against the doctors' reports. At the close of the hearing, the appeals officer stated he would issue a written determination, but no further mention was made regarding supplemental evidence.

In April 2021, the appeals officer issued its written decision. The appeals officer found that the insurer did not timely respond to Henderson's request to transfer care under NRS 616C.090 and, therefore, her request was deemed granted. Nevertheless, the appeals officer affirmed the insurer's determination that Henderson was at MMI and did not require further treatment based on the credible medical evidence and, therefore, the transfer-of-care issue was moot.

Henderson filed a motion for reconsideration based on newly discovered evidence in the form of a letter from Dr. Perry dated March 19, 2021. In his letter, Dr. Perry noted that he had not seen Henderson since her September 30, 2020, IME and had not been provided with the

Southwest Medical records prior to her IME. After reviewing the additional documentation, Dr. Perry stated that if Henderson was still symptomatic, he "recommended that she return to her treating physician and present information for the possibility of continued care." The appeals officer denied the motion.

Henderson subsequently filed a petition for judicial review, which the district court denied following a hearing. This appeal followed.

On appeal, Henderson challenges the denial of her petition for judicial review, arguing that the appeals officer's decision was not supported by substantial evidence as it was based on Dr. Sharif's report that was speculative, not an assessment of her current condition, and improperly failed to take into account the newly discovered evidence from Dr. Perry presented in her motion to reconsider.

Like the district court, this court reviews an appeals officer's decision in workers' compensation matters for clear error or abuse of discretion. NRS 233B.135(3); *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557, 188 P.3d 1084, 1087 (2008). Our review is confined to the record before the appeals officer, and on issues of fact and fact-based conclusions of law, we will not disturb the appeals officer's decision if it is supported by substantial evidence. *Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087-88; *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). "Substantial evidence is evidence that a reasonable person could accept as adequately supporting a conclusion." *Vredenburg*, 124 Nev. at 557 n.4, 188 P.3d at 1087 n.4 (internal quotation marks omitted). Further, this court will not substitute its judgment for that of the appeals officer regarding the weight of the evidence on questions of fact. NRS 233B.135(3); *Maxwell v. SIIS*, 109 Nev. 327, 331, 849 P.2d 267, 271 (1993).

Here, we conclude that the appeals officer's decision was supported by substantial evidence. The evidence before the appeals officer at the hearing showed that Henderson completed physical therapy and required no further treatment of the cervical spine. Dr. Sharif's report concluded that Henderson would be considered MMI following physical therapy. Although Henderson is correct that Dr. Sharif did not evaluate her again to determine whether she was MMI following treatment, other evidence corroborated Dr. Sharif's report and supported the insurer's determination that further treatment was unnecessary; namely, Dr. Perry's report following Henderson's IME. Dr. Perry reviewed the medical records presented to him and, after a physical examination of Henderson, determined that she did not require further treatment. Additionally, Henderson presented her Southwest Medical records to the appeals officer and, at the hearing, the officer stated that he would review the records and weigh them against the reports from Drs. Perry and Sharif. Given the appeals officer's conclusion regarding the "credible" medical evidence, he apparently gave more weight to Dr. Perry's IME report and Dr. Sharif's report than the Southwest Medical records, and we will not substitute our judgment as to the weight of the evidence on questions of fact. NRS 233B.135(3).

Further, Henderson's contention that the appeals officer failed to consider her "newly discovered evidence" from Dr. Perry's letter is unpersuasive. In workers' compensation matters, rehearing of a decision is only appropriate if it is "based on good cause or newly discovered evidence." NAC 616C.327(1).

Initially, we note that Henderson has not shown that the appeals officer failed to consider Dr. Perry's letter. Rather, the record shows

it was submitted as part of her motion for reconsideration, which the appeals officer denied.

Turning to that denial, Henderson failed to demonstrate good cause, and the letter provided from Dr. Perry was not "newly discovered evidence," as it was based on her Southwest Medical records and therefore could have been presented to Dr. Perry prior to her September 30 IME, or at the very least prior to the March 2021 hearing. *Cf. Drespel v. Drespel*, 56 Nev. 368, 374, 45 P.2d 792, 793 (1935) (recognizing that evidence that was within a party's power to present during a first trial will not constitute newly discovered evidence supporting a grant of a motion for a new trial), *reh'g granted in part on other grounds*, 56 Nev. 368, 54 P.2d 226 (1936); *see also Defs. of Wildlife v. Bernal*, 204 F.3d 920, 929 (9th Cir. 2000) (providing that, in moving for a new trial based on newly discovered evidence under FRCP 59(a), the movant must demonstrate "the exercise of due diligence would not have resulted in the evidence being discovered at an earlier stage"). Henderson has not explained why she failed to present the Southwest Medical records to Dr. Perry at her IME or shortly thereafter to obtain an updated recommendation to support her position before the appeals officer. Additionally, Dr. Perry's letter stated that he did not evaluate Henderson again, so his recommendation was not based on new developments in Henderson's condition. And importantly, the letter provided only that "if" Henderson was still symptomatic, she should return to her treating physician for further care. As respondents pointed out, Henderson did not present any evidence that she was still symptomatic. Thus, to the extent Dr. Perry's letter could arguably support her contention that she required further treatment, Henderson failed to exercise due diligence in presenting it. *See* NRS 233B.135(2) ("The burden of proof is on

the party attacking or resisting the decision to show that the final decision is invalid . . . ."). Accordingly, the appeals officer properly refused to grant reconsideration on this basis. *See* NAC 616C.327(1). We therefore

ORDER the judgment of the district court AFFIRMED.[1]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Adriana Escobar, District Judge
Janet Trost, Settlement Judge
GGRM Law Firm
Gilson Daub, LLP
Eighth District Court Clerk

[1]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.