

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE BARRERAS,
Appellant,
vs.
NEVADA INSURANCE GUARANTY
ASSOCIATION,
Respondent.

No. 86812-COA

FILED

MAY 28 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *E.A. Brown*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Jose Barreras 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.

Barreras was employed as a laborer for Frehner Construction in March 2007 when he sustained an industrial injury in Las Vegas while in the course and scope of his employment at age 33.¹ A high steel beam or concrete block weighing approximately 1800 pounds fell or rolled and struck him on the pelvis and legs, causing multiple injuries. On the day of the industrial accident, Barreras was taken to UMC Trauma Center where he was found to have multiple injuries, including fracture of the proximal right femur, fracture of the right transverse process of L-5, multiple fractures with displacement of the pelvis, right acetabular fracture, right sacral fracture with sacroiliac joint involvement, urethral disruption, rectal tear and trauma with perirectal abscess. Barreras was taken into surgery the same day and again two days later for an exploratory laparotomy, repair of rectal tear, colostomy, bladder catheter insertion, and placement of an intramedullary rod through the right femur. Barreras was discharged from

¹While we refer to events that occurred after August 2019 to provide context, these circumstances do not form the basis for our disposition.

the acute hospital to a rehabilitation facility approximately one month after he was admitted on the day of the injury.

Barreras underwent multiple surgeries and procedures over the following three years, including a takedown of the loop colostomy, repair of parasternal hernia, transurethral urethrotomy, and surgery for anal stricture. In November 2008, Ronald Kong, M.D., began seeing Barreras on a monthly basis to provide medication prescriptions and referrals to specialists, as needed. His initial impressions were: “1) pelvic fracture healed, 2) right femoral fracture status post ORTP, 3) leg length discrepancy shorter on the right, 4) anal fistula status post colostomy, 5) urethral strictures, 6) erectile dysfunction[,] and 7) mobility dysfunction secondary to above.”

In September 2010, Larry Tarno, D.O., conducted a permanent partial disability (PPD) rating examination and determined Barreras had a combined 45 percent whole person impairment. Dr. Tarno noted that Barreras was “considered to be at Maximum Medical Improvement by his treating doctors, Stable, and Ratable,” and recommended claim closure with periodic follow-up for “the urethral and bowel problems.” Shortly thereafter, Barreras accepted a lump sum disbursement of 25 percent of his 45 percent PPD award, with the remaining 20 percent to be paid periodically. This closed the claim with a provision that the insurer would continue to provide medical benefits as needed.²

²The insurer has changed over the years. S&C Claims Services Inc. was the insurer at the time of the claim closure and is not a party in this case. It is unclear when respondent Nevada Insurance Guaranty Association began to administer Barreras’ claim, but it appears to have done so after Frehner Construction and its workers compensation carrier, Builders Insurance Company, ceased operations. Further, Barreras asserts

Although Barreras' initial workers' compensation filings are not in the record on appeal, it appears that Barreras had requested permanent total disability (PTD) status. However, PTD was denied and this resulted in litigation which ultimately led to a supreme court settlement conference in February 2015. The parties entered into a stipulation providing for the payment of \$88,225 (the remaining 20 percent of Barreras' 45 percent PPD award), and in exchange, Barreras would "refrain from applying for permanent total status for 10 years."

In May 2016, Barreras, a Clark County resident, underwent placement of a penile prosthesis at a UCLA medical facility because his urological condition was unresolved or had worsened.³ In August 2016, Dr. Kong released Barreras to return to work with "permanent work restrictions." In September 2016, the insurer discontinued temporary total disability (TTD) benefits based on Dr. Kong's conclusion that Barreras could return to work with permanent restrictions. Barreras appealed this decision with the appeals office.

Later in September 2016, Barreras requested vocational rehabilitation benefits, for which he was found eligible in October 2016 and began receiving biweekly payments. In August 2017, the parties filed a stipulation to dismiss the appeal over the denial of TTD, whereby Barreras' dispute regarding TTD was dismissed in exchange for a \$50,000 vocational rehabilitation buyout.

In October 2018, Barreras saw Joseph Thornton, M.D., in Las Vegas for fecal and urinary incontinence, who referred him to another

that Gallagher Bassett assumed responsibility for the administration of his claim in June 2023.

³Barreras is married and has children.

physician at UCLA. In May 2019, Barreras underwent surgery consisting of the autologous fascia lata spiral sling of the anal sphincter to treat fecal incontinence. A tense left thigh hematoma which required evacuation at bedside caused post-operative complications.

In June 2019, Daniel Lee, M.D., performed irrigation and debridement for compartment and wound infection of the left thigh. Dr. Lee described Barreras as disabled and took him off work and recommended suture removal as well as close follow-up with his surgeon in California. Barreras returned to UCLA twice in July 2019 for post-operative exams.

In August 2019, in response to the significant increase in the level of the treatment Barreras required, he requested reopening of his claim, without seeking TTD, based on the reporting of Dr. Kong, who had been examining Barreras periodically for medical and medication management, and his UCLA doctors. Respondent Nevada Insurance Guaranty Association (the Insurer) denied Barreras' request. In October 2019, a hearing officer affirmed the Insurer's denial, stating the evidence provided in support of the application for reopening "do[es] not show a change in circumstances or worsening of condition to warrant claim reopening." Barreras appealed this decision.

In October 2019, Barreras was examined by Ja-Hong Kim, M.D., at UCLA for his fecal incontinence and lifetime catheterization. Dr. Kim described Barreras' history and conditions of pelvic pain, urethral stricture, and "total incontinence of stool that is only about 50% improved after [the May 2019] surgery." Dr. Kim described the conditions as "debilitating injuries which will continue for the rest of his life and require ongoing medical care."

In November 2019, Barreras returned to Dr. Thornton with symptoms of fatigue, weight gain, leg swelling, blood in stool, constipation,

rectal pain, diarrhea, difficulty urinating, and neck pain. Dr. Thornton noted the failed surgeries and recommended a permanent colostomy.

In February 2020, Barreras returned to Dr. Kong and reported worsened incontinence and problems with both his sacral nerve stimulation device and his penile implant. Dr. Kong recommended follow-up treatment to address these issues at UCLA. UCLA andrologist Jacob Rajfer, M.D., saw Barreras to evaluate his penile implant, which was causing pain upon deflation. But Dr. Rajfer did not recommend surgical intervention at that time based on Barreras' history, instead ordering Barreras to follow up in one year.

In June 2020, Barreras returned to UCLA and underwent a cystostomy revealing "slight narrowing and scar tissue." In July 2020, Barreras saw a colon and rectal surgeon, Mary Kwan, M.D., for his fecal incontinence.

In October 2020, Barreras was seen by Dr. Rajfer at UCLA regarding his prosthesis. Dr. Rajfer noted a tear in the prosthesis that prevented it from inflating and referred Barreras to Jesse Mills, M.D., for the repair of the device. In December 2020, after conducting a cystoscopy exam, Dr. Mills surgically replaced Barreras' inflatable penile prosthesis.

In March 2021, Barreras saw Dr. Kim, who reiterated that his loss of sphincter control had improved by only about 50 percent after the May 2019 surgery, and that Barreras' condition was debilitating and would require life-long ongoing medical care. Later in March, Barreras underwent an explant and replant of the penile prosthesis. He followed up post operatively at UCLA twice. However, in May 2021, Dr. Mills noted problems with one of the implant's reservoirs and recommended revision surgery, which Barreras underwent in June 2021.

In April 2021, the appeals officer held an evidentiary hearing and ended it by asking the parties to resubmit some exhibits that his office may have misplaced. The appeals officer stated that he would make a decision within 30 days after the documents were submitted.⁴ Barreras continued to receive treatment from his physicians at UCLA and several other providers in Las Vegas.⁵

In September 2022, the appeals officer issued an order affirming the denial of reopening Barreras' claim, finding that Barreras' condition "has remained constant." In the order, the appeals officer stated that Barreras "has been released in the past with permanent work restrictions," and his status "has not changed." Therefore, the appeals officer concluded that Barreras had not met his burden under NRS 616C.390(1) because "he cannot demonstrate the requisite change of circumstances justifying the reopening." The appeals officer further stated that, "the evidence is clear that from 2016 to the present, Dr. Kong continuously released Claimant to work with permanent restrictions."

⁴For unknown reasons, the original appeals officer did not issue a decision. In May 2022, the case was reassigned to another appeals officer, who scheduled a status conference for later that month. The new appeals officer subsequently issued an order setting a closing argument briefing schedule, and ultimately issued the September 2022 decision that is the subject of this appeal without a new evidentiary hearing but after the parties completed closing argument briefing.

⁵In September 2021, Dr. Kong referred Barreras to orthopedic surgeon, Bernard Ong, M.D., for treatment of his shorter right leg. Dr. Ong later recommended total knee replacement. In October 2021, Barreras presented to Dr. Rajfer at UCLA with a nonfunctioning penile prosthetic. Dr. Rajfer referred Barreras to Dr. Mills, who recommended another cystostomy. Barreras returned to UCLA in December 2021 for a cystoscopy and for reprogramming of his sacral neurostimulator. Barreras also continued to see Dr. Kong in 2022.

Barreras petitioned for judicial review, which the district court denied. Barreras moved for reconsideration, which the court also denied. Barreras appeals, arguing that the appeals officer erred or abused his discretion in affirming the hearing officer and the Insurer's denial of his request to reopen the claim because the appeals officer used the wrong time frame to evaluate the claim, and substantial evidence does not support his conclusion that Barreras' condition had remained constant and unchanged. In response, the Insurer argues that Barreras failed to meet his burden of proof to establish that he was entitled to reopen his claim. Specifically, the Insurer argues that since 2016, Dr. Kong has continuously released Barreras to work with permanent restrictions, which have not changed and, therefore, Barreras cannot prove a change of circumstances. Further, the Insurer asserts, the buyout of the vocational rehabilitation claim precludes the receipt of any TTD benefits under NAC 616C.577(2).

Standard of review

This court reviews an administrative agency's decision for clear error or an abuse of discretion, independently reviewing purely legal issues and upholding fact-based conclusions when such conclusions are supported by substantial evidence. *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005); *see also* NRS 233B.135(3)(a)-(f); *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). Substantial evidence is that "which a reasonable mind might accept as adequate to support a conclusion," regardless of whether we ourselves would have reached the same conclusion in the appeals officer's place. *Horne v. State Indus. Ins. Sys.*, 113 Nev. 532, 537, 396 P.2d 839, 842 (1997) (quoting *Schepcoff v. State Indus. Ins. Sys.*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993)). Thus, this court will not reweigh the evidence or substitute our judgment for that of the appeals officer on a question of fact. *Id.* Further,

the party attacking or resisting the decision has the burden of proof to show that the final decision is invalid. NRS 233B.135(2). Moreover, an employee has the burden of proof to demonstrate by a preponderance of the evidence that the claim should be reopened. *State Indus. Ins. Sys. v. Hicks*, 100 Nev. 567, 569, 688 P.2d 324, 325 (1984); *see also Ruffner v. State Indus. Ins. Sys.*, 113 Nev. 881, 884, 944 P.2d 250, 252 (1997) (holding the fact finder must consider whether the claimant “could demonstrate a comparative change in circumstances relating to his injury by a preponderance of evidence”).

The appeals officer’s finding of no change of circumstances was based on an error of law and lacks the support of substantial evidence

Under Nevada law, if a workers’ compensation claim has been closed for over one year, the claimant must meet the three-part statutory test for reopening. NRS 616C.390(1). First, there must be a change of circumstances that “warrants an increase or rearrangement of compensation during the life of the claimant;” second, the primary cause of the change of circumstances must be the industrial injury; and third, the application must be accompanied by a certificate of a physician showing there is a change of circumstances that warrants an increase in compensation. NRS 616C.390(1). Moreover, “the relevant time period to determine whether [a claimant’s] condition worsened [is] between the closing of his claim . . . and when he requested [the insurer] to reopen it.” *Ruffner*, 113 Nev. at 884, 944 P.2d at 252.

In this case, we conclude that Barreras’ claim was closed in 2010. Therefore, it is the comparison between Barreras’ condition at the time of claim closure in 2010 and his worsened condition when he requested the reopening in 2019 that may constitute changed circumstances necessitating an increase or rearrangement in compensation. *See id.* We note that Barreras has not been denied medical benefits for the treatment

he requires at this time, but instead is requesting an increase or rearrangement of compensation based on changed circumstances.

Here, both the appeals officer and the Insurer considered 2016 as the starting point to evaluate whether a change of circumstances occurred justifying the reopening of the claim, even though 2010 was the year the claim was closed. This was an error under *Ruffner* and NRS 233B.135(3)(a) (violation of statute), (d) (error of law) and (e) (clearly erroneous decision). The Insurer does not actually respond to Barreras' argument on this point apparently because it believes that Barreras was only seeking TTD benefits, and such benefits were barred because of the settlement where Barreras received \$50,000 in lieu of vocational retraining. The Insurer (and the appeals officer) would be correct under NAC 616C.577(2) if Barreras was seeking only TTD, but he was not. While he did inaccurately refer to TTD in his closing argument briefing filed with the appeals officer, he was seeking the "full complement of benefits" associated with an open claim, including PPD. The 2015 settlement imposed a restriction because it stipulated that Barreras would "refrain from applying for permanent total status for 10 years." Yet, he did not apply for TTD nor PTD in his 2019 letter requesting reopening. However, his inaccurate reference to TTD in his briefing below was consequential in the denial of reopening.

On appeal, Barreras clarified that he is arguing that the improper denial of reopening precludes the possibility of PPD under NRS 616C.490, lost time benefits under NRS 616C.475, and an independent medical examination under NRS 616C.145.⁶ Although Barreras' medical

⁶It appears that any potential benefits derived from NRS 616C.475 are unavailable because they are under TTD. However, any benefits derived from NRS 616C.490 could potentially be available to Barreras since they are

benefits are not at issue, based on the provision to provide benefits at the time of claim closure, we nevertheless recognize that where changed circumstances require further treatment, a claim may be reopened. See *Gilman v. Clark Cnty. Sch. Dist.*, 139 Nev., Adv. Op. 7, 527 P.3d 624, 629 (Ct. App. 2023). Barreras asserts that ancillary benefits are available if there is an open claim and a need is shown. He makes no argument regarding entitlement to TTD. The finding of the appeals officer and the argument of the Insurer on lack of change in the work restrictions from 2016 to 2019 is not dispositive if TTD benefits alone are not sought. Further, Barreras argues that if the correct time period had been considered, starting with 2010, the exacerbation of his condition would have been much more evident.

The appeals officer found that Barreras' condition from 2016 to 2019 had "remained constant." However, Barreras' claim was closed following a PPD determination in 2010. At the time, although Dr. Tarno wrote that Barreras would need periodic follow-up for the urethral and bowel problems, he was "considered to be at Maximum Medical Improvement by his treating doctors, Stable, and Ratable." The Insurer argues that the medical evidence fails to demonstrate that there has been a change of circumstances to Barreras' industrial injury warranting an increase or rearrangement of compensation. However, the year of the claim closing must be used for comparison purposes and it was not. Further, even if 2016 were the applicable year, it is undisputed that Barreras' fecal incontinence became acute resulting in surgery at UCLA in May 2019 for autologous fascia lata spiral sling of the anal sphincter with resulting

under PPD. See also NRS 616C.392 (providing the circumstances under which an insurer is required to reopen a claim for PPD).

complications, a follow-up for wound care, suture removal, post-surgical visits with the surgeon in southern California, and two weeks where Barreras could not work due to disability.⁷

These developments were only briefly noted by the appeals officer by referring to Dr. Kong's July 2019 report without any discussion of their significance. The appeals officer's finding that Barreras' condition had remained constant with no change of circumstances is undermined by the officer's superficial consideration of these events. A comparison to Barreras' condition in 2010 with all the relevant medical records could show that there was a change of circumstances sufficient to satisfy NRS 616C.390(1)(a).⁸

Further, upon closing of the claim in 2010, Barreras only required medical and medication management. As time progressed, however, medical management was not sufficient to address Barreras' medical condition, and the May 2019 surgery marked a significant increase

⁷Dr. Kim described Barreras' "total incontinence of stool" as debilitating in October 2019, approximately two months after Barreras requested to reopen the claim. Therefore, the comment was made outside of the statutory time frame for assessing a change of circumstances. However, the comment was made during a follow-up visit for the May 2019 surgery. Dr. Kong said in early August 2019 that Barreras needed to follow up with his California physician and this was in the record in front of the appeals officer. Both the appeals officer in his order and the Insurer below and on appeal describe medical treatment occurring up to and beyond March 2021.

⁸While considering Barreras' health condition after August 2019 is used to provide context only, *see Ruffner*, 113 Nev. at 884, 944 P.2d at 252, we note that the record is clear that Barreras' conditions continued to deteriorate and the appeals officer and the Insurer cited events occurring up to March 2021, and the appeals officer's order referred to 2016 to the present. We further note that most of the events and medical problems subsequent to August 2019 were connected to the conditions that prompted the filing of the request to reopen and were helpful to explain the severity and acute nature of the problems. The Insurer has not challenged this on appeal.

of the level of his medical care. If no surgeries occurred between 2010 and May 2019, this expansion of treatment due to Barreras' condition, when compared to Barreras' medical status as described by Dr. Tarno in his 2010 evaluation, could constitute a change in circumstances especially when all of the relevant medical information from providers in Las Vegas and UCLA is considered.

In addition to the increased need for medical care in 2019, the record reflects the need for multiple surgeries for Barreras' fecal incontinence, defective penile prosthesis, and a recommendation for a total knee replacement due to Barreras' shorter right leg. Further, Barreras experienced only about 50 percent improvement in the loss of sphincter control after the May 2019 surgery. The need for treatment became progressively and increasingly acute since the claim was closed in 2010, such that it may warrant an increase or rearrangement of his compensation. *See* NRS 616C.390(1)(a).

Finally, there is no dispute that Barreras' worsened condition is primarily related to his industrial injury. S&C Claims accepted Barreras' claim as an industrial injury, and the Insurer has not argued that any outside factors contributed to his condition. Thus, this element is satisfied. *See* NRS 616C.390(1)(b).

Therefore, it was an error of law to not use the date the claim was closed when deciding whether to reopen it and an abuse discretion to not consider all relevant medical information relating to Barreras' health condition between 2010 and 2019 when deciding whether a change of circumstances has been proven. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court.⁹ Upon remand, the district court shall instruct the appeals officer to reexamine Barreras' claim, considering the appropriate evidence within the correct timeframe. This decision should not be read as opining on the ultimate viability of Barreras' reopening claim.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. XIV
Clark & Richards
Gilson Daub, LLP
Eighth District Court Clerk

⁹Insofar as the Insurer has raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for affirming the district court's order.