

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

DONNA J. HAGLEY, Petitioner

August 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0262 (BOR Appeal No. 2044859)
(Claim No. 2008043926)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
MILDRED MITCHELL-BATEMAN HOSPITAL,
Respondent**

MEMORANDUM DECISION

Petitioner Donna J. Hagley, by John Blair, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Mildred Mitchell-Bateman Hospital, by H. Dill Battle III, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 24, 2011, in which the Board affirmed a July 19, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's November 26, 2008, decision granting Ms. Hagley a 3% permanent partial disability award for injuries to her right shoulder, and granted Ms. Hagley a 0% permanent partial disability award. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Ms. Hagley was employed as a certified nursing assistant with Mildred Mitchell-Bateman Hospital. On May 13, 2008, she fractured her upper humerus when she fell while walking down a corridor. On May 19, 2008, Ms. Hagley underwent an open reduction and internal fixation of the displaced greater tuberosity fracture of the right humeral head. On October 31, 2008, Dr. Bachwitt

performed an independent medical evaluation, and recommended a 3% permanent partial disability award for the right shoulder injury. On June 29, 2009, Dr. Guberman performed an independent medical evaluation and found that Ms. Hagley sustained a 7% whole person impairment as a result of her right shoulder injury. On April 2, 2010, Dr. Bailey performed an independent medical evaluation and recommended a 0% permanent partial disability award for Ms. Hagley's right shoulder injury. In her report, Dr. Bailey noted that the range of motion in Ms. Hagley's right shoulder was not significantly different from that of her uninjured left shoulder. Although the claim was also held compensable for a right knee contusion, Ms. Hagley only appeals the amount of permanent impairment attributed to the right shoulder.

In its Order reversing the November 26, 2008, claims administrator's decision, the Office of Judges held that based on the evidence of record, Ms. Hagley is entitled to a 0% permanent partial disability award, in accordance with the opinion of Dr. Bailey. Ms. Hagley disputes this finding and asserts, per the opinion of Dr. Guberman, that she is entitled to a 7% permanent partial disability award.

The Office of Judges noted that Dr. Bailey stated that the injury to Ms. Hagley's arm continued to improve in the interval following the evaluations of Drs. Bachwitt and Guberman. In her report, Dr. Bailey went on to state that she obtained much better range of motion measurements than did Drs. Bachwitt and Guberman, and that Ms. Hagley also reported experiencing less pain than she did when evaluated by Drs. Bachwitt and Guberman. Additionally, the Office of Judges found that Dr. Bailey's explanation of the differences in impairment ratings among the three evaluators was satisfactory. The Board of Review reached the same reasoned conclusions in its decision of January 24, 2011.

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: August 14, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum