

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

BERLYLE A. BARKLEY,
Claimant Below, Petitioner

FILED
July 19, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 11-1585** (BOR Appeal No. 2045964)
(Claim No. 2009078937)

DUANE ZORBRIST GROUP, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Berlyle A. Barkley, by Reginald Henry, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Duane Zorbrist Group, LLC, by T. Jonathan Cook, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated October 28, 2011, in which the Board affirmed a May 19, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's December 8, 2009, decision, and granted Ms. Barkley an 8% permanent partial disability award for her compensable lumbar sprain/strain. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. 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.

Ms. Barkley was injured while working for Duane Zorbrist Group, LLC on February 10, 2009. The claim was held compensable for a sprain/strain of neck, contusion of chest wall, and sprain/strain of lumbar region. On December 8, 2009, the claims administrator granted Ms. Barkley a 5% permanent partial disability award for her lumbar sprain based on the report of Dr. Guberman.

The Office of Judges reversed the claims administrator's decision, and held that the preponderance of the evidence established that Ms. Barkley was entitled to an 8% permanent partial disability award. On appeal, Ms. Barkley argues that it was improper to find that she had

no impairment in her cervical spine when Dr. Walker and Dr. Fleschner both found that she did. Duane Zorbrist Group maintains that the record demonstrates that Ms. Barkley has no cervical impairment related to the compensable injury, but rather her cervical impairment is related to preexisting problems. Dr. Walker evaluated the claimant and found that Ms. Barkley has 8% impairment in the cervical spine, 8% in the lumbar spine, and 5% in the thoracic spine. Dr. Fleschner found the same impairment. Dr. Mukkamala evaluated Ms. Barkley and found that she had no impairment in the cervical spine, and 8% in the lumbar spine.

The Office of Judges concluded that the preponderance of the evidence did not establish that Ms. Barkley had cervical impairment resulting from the compensable injury. It noted that medical evidence demonstrates that she had cervical problems prior to the compensable injury, and that her main concern during treatment of the compensable injury was her lumbar region. The Office of Judges concluded that the evidence establishes that Ms. Barkley has 8% whole person impairment in the lumbar spine resulting from the compensable injury, and is entitled to only an 8% permanent partial disability award in this claim. The Board of Review reached the same reasoned conclusions in its decision of October 28, 2011. We agree with the reasoning and conclusions of the Board of Review.

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: July 19, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II