

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

LARRY J. VANCE, Petitioner

July 20, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0115 (BOR Appeal No. 2044857)
(Claim No. 2007212972)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
EASTERN ASSOCIATED COAL CORPORATION,
Respondent**

MEMORANDUM DECISION

Petitioner, Larry J. Vance, by John C. Blair, his attorney, appeals the Board of Review Order granting an 8% permanent partial disability award. Eastern Associated Coal Corporation, by Robert J. Busse, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 22, 2010, in which the Board affirmed a July 20, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's 8% permanent partial disability award, having concluded that Mr. Vance was entitled to a total of 20% permanent partial disability for the left knee, but finding that he had been previously granted a 12% permanent partial disability award in earlier claims for the left knee. 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, response, 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.

On October 12, 2006, Mr. Vance slipped and fell while coming off a belt line twisting his left knee. Following this injury, Mr. Vance was diagnosed with left knee strain, MCL strain, suspect medial meniscus tear, internal derangement of the left knee, bone bruising of the distal medial

femoral condyle and medial tibial plateau, degenerative changes at the body and posterior horn of the medial meniscus, complete disruption of a prior ACL repair, and popliteal cyst.¹ After Mr. Vance failed to respond to conservative treatment a total left knee arthroplasty was performed by Dr. Vavek S. Neginhal on December 23, 2008. Treatment notes following the arthroplasty indicate Mr. Vance had good results and lessening of his left knee symptoms following the surgery.

Thereafter, Dr. Paul Bachwitt evaluated Mr. Vance and opined 20% impairment pursuant to Table 66, Page 80, American Medical Association's, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). Dr. Bachwitt found the knee to have excellent position and alignment with no complicating features. Dr. Bruce A. Guberman evaluated Mr. Vance on August 11, 2009, and opined Mr. Vance had a poor result from the knee surgery and recommended a 30% impairment. Dr. Saghir R. Mir also evaluated Mr. Vance on December 14, 2009, and opined 20% impairment and disagreed with the impairment rating found in Dr. Guberman's report. Dr. Mir felt the physical therapist notes, treating physician notes, and report of Dr. Bachwitt found fair to good results following the surgery. Only Dr. Guberman opined a poor result from the surgery.

The Office of Judges held a 20% permanent partial impairment rating is supported by the opinions of Dr. Bachwitt and Dr. Mir, but that Mr. Vance had been previously granted a 12% permanent partial disability award in previous claims for the left knee. Dr. Guberman's opinion Mr. Vance had a poor result from the arthroplasty was determined to be inconsistent with Dr. Bachwitt and Dr. Mir's recommendations. The Office of Judges further held that the opinions of Dr. Bachwitt and Dr. Mir are consistent with each other and are more consistent with the treatment notes of Dr. Neginhal. This consistency was found more persuasive on the issue of permanent impairment, while Dr. Guberman's poor result finding was found to be inconsistent with the other evaluating physicians. The Office of Judges, too, found no basis for granting Mr. Vance's request for an additional 10% permanent partial disability. The Board of Review reached the same reasonable conclusion in affirming the Office of Judges in its decision of December 22, 2010.

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 Court affirms the Board of Review Order granting Mr. Vance an 8% permanent partial disability award for his left knee injury.

Affirmed.

¹Mr. Vance suffered prior left knee injuries for which he received an 8% permanent partial disability award on March 11, 1987, and a 4% award on August 1, 1998.

ISSUED: **July 20, 2012**

CONCURRED IN BY:

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin not participating