

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DANA J. LINGER, Petitioner

vs.) **No. 11-0455** (BOR Appeal No. 2045020)
(Claim No. 2007032225)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS, Respondent**

MEMORANDUM DECISION

Petitioner Dana J. Linger, by George Zivkovich, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. West Virginia Board of Governors, by H. Dill Battle, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 22, 2011, in which the Board affirmed an August 20, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's granting 2% 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. Linger injured her neck while working as a custodian at West Virginia University at Parkersburg, when lifting a heavy trash can. The claim was held compensable for neck strain and sprain. After receiving treatment and reaching maximum medical improvement, Ms. Linger was examined by three doctors: Dr. Grady, Dr. Dauphin, and Dr. Bailey. Dr. Grady reported, in August of 2008, that Ms. Linger was impaired 2% in her right shoulder, but no compensable impairment in her cervical spine. The claims administrator adopted Dr. Grady's reasoning and

awarded 2% permanent impairment. Dr. Dauphin, in August of 2009, found significantly more impairment: a 15% whole person impairment with 8% for the upper extremity and 8% for the cervical spine. Dr. Dauphin also stated that the impairments were most likely degenerative and preexisting, but did not state how much of the impairment was compensable and how much was not. Dr. Bailey found a total 4% impairment of Ms. Linger's right shoulder, 1% of which was attributable to the compensable injury.

The Office of Judges weighed the record, including the conflicting reports and findings of the claims administrator. In its Order, the Office of Judges gave Dr. Dauphin's report less evidentiary weight because it was outlying and did not explain how much of the impairment was noncompensable. The Office of Judges found Dr. Grady's report and Dr. Bailey's report to be of equal weight. Since Dr. Grady's report favored claimant and the claims administrator used it as its basis for granting 2% impairment, the Office of Judges affirmed the claims administrator. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its February 23, 2011, Order.

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: November 19, 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