

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

June 12, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DANNY R. MILLER,
Claimant Below, Petitioner

vs.) **No. 11-1309** (BOR Appeal No. 2045721)
(Claim No. 2008017240)

WEST VIRGINIA DIVISION OF HIGHWAYS,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Danny R. Miller, by John C. Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. West Virginia Division of Highways, by Steven K. Wellman, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated August 25, 2011, in which the Board affirmed a February 25, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 11, 2008, decision granting Mr. Miller a 2% permanent partial disability award. 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.

Mr. Miller was employed as a mechanic for the West Virginia Division of Highways on October 23, 2007, when he received an injury to his left elbow and forearm. He was repairing a snow plow when the plow attachment shifted and hyperextended his left elbow. He was diagnosed with a strain of the left forearm and elbow. The claims administrator held his claim compensable for those injuries on October 29, 2007. On March 7, 2008, Dr. McCleary performed reconstructive surgery on Mr. Miller's left elbow. Mr. Miller returned to work at the Division of Highways on September 20, 2008, following his recovery from surgery. Mr. Miller

was then evaluated by Dr. Scott, who issued a report based on his examination, stating that Mr. Miller had reached maximum degree of improvement and found no evidence that Mr. Miller's physical capacities had been limited by the injury. Dr. Scott found a 2% whole body impairment according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), based on Mr. Miller's loss of flexion and loss of supination of the left elbow. Based on Dr. Scott's report, the claims administrator granted Mr. Miller a 2% permanent partial disability award on December 11, 2008. The claims administrator's decision was affirmed by the Office of Judges on February 25, 2011, and by the Board of Review on August 25, 2011, leading to this appeal.

Following the December 11, 2008, decision of the claims administrator, Mr. Miller was evaluated by Dr. Poletajev, who found a 12% whole body impairment based on Mr. Miller's loss of range of motion, decrease in sensation, loss of grip strength, and scars from the surgery. Dr. Poletajev also found that Mr. Miller had some moderate to severe restrictions in his daily household activities. Mr. Miller was also evaluated by Dr. Mukkamala, who agreed with Dr. Scott's impairment rating and stated that Mr. Miller was able to carry out his daily activities with minimal restrictions.

In its Order, the Office of Judges determined that a preponderance of the evidence weighed in favor of finding that Mr. Miller had a 2% whole body impairment relating to his October 23, 2007, injury. The Office of Judges considered the reports of Dr. Scott, Dr. Poletajev, and Dr. Mukkamala, and was persuaded by the reports of Dr. Scott and Dr. Mukkamala. The Office of Judges found that the report of Dr. Poletajev was not reliable because he listed symptoms and restrictions which were inconsistent with the other physicians' reports in the record as well as the fact that Mr. Miller had returned to work, performing heavy physical labor. The Office of Judges also found that Dr. Poletajev's report was contradicted by the picture evidence of Mr. Miller's scars because the pictures did not reveal any inflammation or disfigurement. The Office of Judges determined that a 2% permanent partial disability award was appropriate in relation to Mr. Miller's October 23, 2007, injury.

The Board of Review adopted the findings of the Office of Judges and affirmed its Order. We agree with the conclusions of the Board of Review. The Office of Judges made its determination based on the preponderance of the evidence because it found the report of Dr. Poletajev unpersuasive and in doing so it pointed to specific and credible reasons.

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: June 12, 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