

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

June 5, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JANET S. ROSIEK,
Claimant Below, Petitioner

vs.) **No. 11-1315** (BOR Appeal No. 2045603)
(Claim No. 2007221503)

APPALACHIAN POWER COMPANY,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Janet S. Rosiek, by Patrick K. Maroney, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Appalachian Power Company, by James W. Heslep, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated August 23, 2011, in which the Board affirmed a January 28, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 31, 2009, decision granting a 0% 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.

Ms. Rosiek injured her hand, elbow, and shoulder due to repetitive work in her employment for Appalachian Power Company. On October 15, 2008, the Office of Judges held the claim compensable for right lateral epicondylitis. On December 31, 2009, the claims administrator granted a 0% permanent partial disability award for epicondylitis of the right elbow pursuant to Dr. Mukkamala's independent medical evaluation dated December 21, 2009.

The Office of Judges affirmed the claims administrator's decision, and held that Ms. Rosiek suffered no permanent impairment due to her lateral epicondylitis of the right elbow. On appeal, Ms. Rosiek disagrees and asserts that Dr. Guberman's report is not unreliable or unpersuasive and therefore, should be adopted. She also asserts that Dr. Mukkamala's report is unpersuasive and unreliable because he did not report any range of motion findings did as Dr. Guberman and Dr. Bachwitt. Appalachian Power Company maintains that Ms. Rosiek failed to establish that the Board of Review committed error and that she is entitled to an increased permanent partial disability award. On December 21, 2009, Dr. Mukkamala found Ms. Rosiek had 0% permanent impairment from this injury. On May 11, 2010, Dr. Guberman calculated 1% upper extremity impairment for range of motion abnormalities in the radial and ulnar deviation of the right wrist, 1% upper extremity impairment for range of motion abnormalities for the right elbow, and 9% upper extremity impairment for range of motion abnormalities for the right shoulder. This results in a 7% whole person impairment. On August 17, 2010, Dr. Bachwitt evaluated Ms. Rosiek and did not find any range of motion, sensory, motor, reflex, or radiographic abnormalities.

The Office of Judges concluded that Dr. Guberman's report is unreliable and unpersuasive because he rates range of motion abnormalities of the right wrist, elbow and shoulder when the claim is only compensable for epicondylitis of the right elbow. The Office of Judges found that Dr. Mukkamala and Dr. Bachwitt were more persuasive. It held that Ms. Rosiek suffered no permanent impairment due to her lateral epicondylitis of the right elbow. The Board of Review reached the same reasoned conclusions in its decision of August 23, 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: June 5, 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