

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

August 13, 2014

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

APRIL MILLER,
Claimant Below, Petitioner

vs.) **No. 13-0370** (BOR Appeal No. 2047634)
(Claim No. 2008002710)

FAYETTE COUNTY BOARD OF EDUCATION,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner April Miller, by Reginald D. Henry and Rodney A. Skeens, her attorneys, appeals the decision of the West Virginia Workers' Compensation Board of Review. Fayette County Board of Education, by Matthew L. Williams, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 22, 2013, in which the Board affirmed a September 12, 2012, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 16, 2011, decision granting no 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. Miller worked as a secretary for the Fayette County Board of Education. On July 16, 2007, Ms. Miller fell out of a chair and hit the back of her head on the corner of a desk, which produced a bruise on the back of her head. The claims administrator held the claim compensable for a contusion of the face, scalp, and neck and an unspecified head injury. Following the injury, Ms. Miller was treated by Rajesh Patel, M.D., for complaints of mid and low back pain, which Dr. Patel found had pre-existed the injury. An MRI was then taken of Ms. Miller's cervical spine which showed multilevel degeneration without disc herniations. Michael J. Kominsky, D.C.,

then evaluated Ms. Miller and found that she had headaches and neck pain for the last five to eight years. Dr. Kominsky also determined that Ms. Miller was severely limited due to fibromyalgia. Andrew E. Landis, M.D., also evaluated Ms. Miller and determined that she had no whole person impairment under the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) related to her compensable injury. On March 16, 2011, the claims administrator granted Ms. Miller no permanent partial disability award based on Dr. Landis's report. Dr. Kominsky then evaluated Ms. Miller a second time and found that she had 4% impairment under the American Medical Association's *Guides* for a C5-6 disc protrusion. He also recommended 6% impairment for abnormal motion in the cervical spine, which he combined for a 10% whole person impairment rating. Dr. Kominsky adjusted this rating to 8% to fit within Cervical Category II of West Virginia Code of State Rules § 85-20-E (2006). Bill Hennessey, M.D., then evaluated Ms. Miller. He determined that she had 0% whole person impairment related to her compensable injury. On September 12, 2012, the Office of Judges affirmed the claims administrator's decision. The Board of Review affirmed the Order of the Office of Judges on March 22, 2013, leading Ms. Miller to appeal.

The Office of Judges concluded that Ms. Miller had 0% whole person impairment related to the July 16, 2007, injury. In reaching this determination, the Office of Judges relied on the opinions of Dr. Landis and Dr. Hennessey. The Office of Judges found that Ms. Miller was suffering from multiple non-compensable conditions, including fibromyalgia and a lumbar sprain. The Office of Judges found that the only conditions related to the compensable injury were a contusion of the face, scalp, and neck and an unspecified head injury. It determined that Dr. Landis and Dr. Hennessey found no permanent impairment related to these conditions. It also considered the impairment recommendation of Dr. Kominsky. However, the Office of Judges found that Dr. Kominsky's impairment rating related to Ms. Miller's non-compensable conditions, including her cervical strain and cervical disc protrusion at the C5-6 disc. 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 and the findings of the Office of Judges. Ms. Miller has not demonstrated that she is entitled to any permanent partial disability award related to her July 16, 2007, injury. The only conditions related to this injury are a contusion of the face, scalp, and neck and an unspecified injury of the head. Dr. Landis and Dr. Hennessey both determined that these conditions had completely resolved and Ms. Miller had no whole person impairment related to her injury. There is nothing in the record undermining the credibility of Dr. Landis's and Dr. Hennessey's recommendations, and the Office of Judges was within its discretion in relying on their opinions. The Office of Judges also properly disregarded Dr. Kominsky's recommendation. Ms. Miller has a significant history of pre-existing, non-compensable health problems. Dr. Kominsky's impairment recommendation would have provided Ms. Miller with recovery for these conditions.

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: August 13, 2014

CONCURRED IN BY:

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

DISSENTING:

Justice Menis E. Ketchum