

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 12, 2016

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

SAMUEL P. CERRA,
Claimant Below, Petitioner

vs.) **No. 15-0425** (BOR Appeal No. 2049874)
(Claim No. 2005003963)

BAYER CORPORATION,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Samuel P. Cerra, by M. Jane Glauser, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Bayer Corporation, by Lucinda Fluharty, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 6, 2015, in which the Board affirmed a September 12, 2014, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 26, 2013, decision granting Mr. Cerra no additional permanent partial disability award for pulmonary impairment above the 9% award he had previously received. 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. Cerra worked for six years as a production technician for Bayer Corporation. His job involved work in proximity to several heated chemicals used in the production of plastic. The area he worked in was often dirty and dusty. In the beginning of 2004, he developed a dry cough which was difficult to control, and he felt congestion in his chest. Mr. Cerra ultimately underwent a biopsy, and Patrick Ross Jr., M.D., determined that he had hypersensitivity pneumonitis. Following this diagnosis, Mr. Cerra filed an application for workers' compensation

benefits based on his occupational exposure. The claims administrator initially denied Mr. Cerra's application, but its decision was reversed by the Office of Judges. The Office of Judges held Mr. Cerra's claim compensable for hypersensitivity pneumonitis.

Two years after the Office of Judges held the claim compensable, Chaunfang Jin, M.D., performed an independent medical evaluation of Mr. Cerra. She determined that he had reached his maximum degree of medical improvement. As part of her evaluation, Dr. Jin reviewed the results of a pulmonary function study taken at West Virginia University Hospital, which revealed that Mr. Cerra's diffusion capacity was 79.9% of the predicted value. Dr. Jin determined, due to his decreased diffusion capacity and mild subpleural fibrosis, that he had 9% whole person impairment under the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). On May 31, 2007, the claims administrator granted Mr. Cerra a 9% permanent partial disability award based on Dr. Jin's evaluation.¹

However, in October of 2012, Mr. Cerra underwent another pulmonary function test at East Ohio Regional Hospital which revealed that Mr. Cerra's diffusion capacity was 56% of the predicted value. The remainder of the tested values were normal. Nevertheless, Attila A. Lenkey, M.D., evaluated Mr. Cerra and found that he had approximately 20% whole person impairment based on the decreased diffusion capacity. Dr. Lenkey did not reference any section of the American Medical Association's *Guides* in support of his opinion and he did not explain how he arrived at his impairment calculation.

Mr. Cerra then submitted an application to reopen his claim for consideration of an additional permanent partial disability award. The claims administrator reopened Mr. Cerra's claim and submitted his request to Dr. Jin for another independent medical evaluation. Dr. Jin found that Dr. Lenkey's calculation of Mr. Cerra's impairment was an overestimation. She found that there was no medical literature indicating the hypersensitivity pneumonitis was a progressive condition. She found that the pulmonary function studies in the record did not provide sufficient evidence of deterioration in Mr. Cerra's lung function to justify an additional award. She determined that Mr. Cerra had 9% whole person impairment under the American Medical Association's *Guides* for diminished diffusion capacity and fibrosis. On March 26, 2013, the claims administrator granted Mr. Cerra no additional permanent partial disability award based on Dr. Jin's recommendation. In March of 2014, a year after this decision was issued, Clinical and Occupational Pulmonary Associates performed another pulmonary function test which determined that Mr. Cerra's diffusion capacity was 57% of the predicted value. Gregory Fino, M.D., then reviewed Mr. Cerra's records. He found that Mr. Cerra had not experienced any deterioration of the lung since he was granted a 9% permanent partial disability award. Dr. Fino admitted that the pulmonary function testing conducted in 2012 and 2014 showed that Mr. Cerra had diminished diffusion capacity. However, he opined that it was difficult to determine Mr. Cerra's pulmonary impairment based exclusively on the diffusion capacity testing because the calculation varied between laboratories. Dr. Fino found that Mr. Cerra had no more than 9%

¹ The claims administrator's May 31, 2007, decision was ultimately protested to the Board of Review who affirmed the amount of the permanent partial disability award. The Board of Review's decision was separately appealed by both Mr. Cerra and Bayer Corporation. This Court refused both petitions on November 23, 2009.

whole person impairment related to his compensable condition. On September 12, 2014, the Office of Judges affirmed the claims administrator's decision. The Board of Review affirmed the Office of Judges' Order on April 6, 2015, and denied Mr. Cerra's alternative motion to remand the claim, which lead him to appeal the decision to this Court.

The Office of Judges concluded that Mr. Cerra has not demonstrated that he is entitled to any greater than the 9% permanent partial disability award previously granted in this claim. The Office of Judges reached this conclusion because it found that there was no reliable medical opinion in the record supporting a higher impairment rating. It noted that both Dr. Jin and Dr. Fino found that Mr. Cerra's pulmonary function had not deteriorated and that he had no more than 9% whole person impairment related to hypersensitivity pneumonitis. The Office Judges considered the 20% impairment recommendation of Dr. Lenkey, but it found that his opinion was unreliable. It found that Dr. Lenkey styled his recommendation as an approximation of Mr. Cerra's impairment. It also found that Dr. Lenkey did not reference the American Medical Association's *Guides* or provide any explanation of how he arrived as the recommended impairment rating. The Office of Judges admitted that the recent diffusion capacity testing in the record may demonstrate that Mr. Cerra's pulmonary function had declined. However, it found that the pulmonary function testing was not sufficient to entitle Mr. Cerra to a greater permanent partial disability award considering he did not submit a reliable medical opinion in support of his claim. The Board of Review adopted the findings of the Office of Judges, with minor corrections, and affirmed its Order.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Mr. Cerra has not presented sufficient evidence that he is entitled to greater than a 9% permanent partial disability award for hypersensitivity pneumonitis. The reports of Dr. Jin and Dr. Fino demonstrate that Mr. Cerra does not have greater than 9% whole person impairment and show that he has been fully compensated by his prior award. These reports are sufficiently supported by the remainder of the evidence in the record. Although the pulmonary function testing from 2012 and 2014 indicates that Mr. Cerra has diminished diffusion capacity, the report of Dr. Fino adequately undermines the reliability of the predicted values in this testing. The Office of Judges was within its discretion in disregarding Mr. Cerra's diffusion capacity values, particularly considering that he did not support his application with a reliable impairment recommendation based on those values. Mr. Cerra is also not entitled to have his claim remanded for an additional independent medical evaluation. There is no indication that Mr. Cerra did not have the opportunity to present necessary evidence before the Office of Judges, and he has not submitted any argument that adequately supports his request.

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: April 12, 2016

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Allen H. Loughry II