

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 12, 2016

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

AARON J. SHULTZ,
Claimant Below, Petitioner

vs.) **No. 15-0502** (BOR Appeal No. 2049968)
(Claim No. 2009055419)

EASTERN ASSOCIATED COAL CORPORATION,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Aaron J. Shultz, by Robert L. Stultz, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Eastern Associated Coal Corporation, by Henry C. Bowen, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 30, 2015, in which the Board affirmed an October 10, 2014, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's November 15, 2012, decision granting a 3% permanent partial disability award for his compensable left shoulder injury. 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. Shultz worked as an underground coal miner for Eastern Associated Coal Corporation. On August 8, 2008, he suffered an injury to his left shoulder while moving a safety curtain. Mr. Shultz was initially treated for a left shoulder sprain. However, he received treatment from Dean Steinman, D.O., a week after the injury, and Dr. Steinman's impression was that Mr. Shultz had a rotator cuff tear. Dr. Steinman noted that Mr. Shultz had suffered a non-compensable left shoulder injury a year earlier when he was struck by a motor vehicle.

The claims administrator initially rejected Mr. Shultz's application for workers' compensation benefits, but this decision was ultimately reversed by the Office of Judges.¹ Mr. Shultz then came under the care of George Bal, M.D., who surgically repaired Mr. Shultz's left rotator cuff tear. Following the surgery, Mr. Shultz developed and was treated for Methicillin Resistant Staphylococcus Aureus (MRSA) which required irrigation and debridement operations. Mr. Shultz's conditions subsequently began to improve. But on January 15, 2009, he fell on the stairs at his home injuring his left elbow and left shoulder.

After the fall, Mr. Shultz was again treated by Dr. Bal, who found that he had been recovering well up to the point of his home injury but now had a significant decrease in his left shoulder range of motion. Dr. Bal had an MRI taken of Mr. Shultz's shoulder which revealed a recurrent tear of the rotator cuff. Dr. Bal then performed a second surgery on Mr. Shultz's shoulder. During Mr. Shultz's recovery, he contracted MRSA for a second time and underwent an extensive course of antibiotics as well as further operations to treat the infection.²

On October 13, 2012, following this extensive course of treatment, Sushil M. Sethi, M.D., performed an independent medical evaluation on Mr. Shultz. He found that Mr. Shultz had reached his maximum degree of medical improvement and had exhausted all necessary treatment. Dr. Sethi noted that Mr. Shultz suffered a prior injury to the same area of his shoulder when he was hit by a motor vehicle in 2007. He also noted that Mr. Shultz suffered an intervening injury in 2009 when he fell down his stairs at home. Dr. Sethi calculated that Mr. Shultz had 3% whole person impairment for the loss of range of motion in his left shoulder based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). On November 15, 2012, the claims administrator granted Mr. Shultz a 3% permanent partial disability award based on Dr. Sethi's calculation. However, the next year, Bennett D. Orvik, M.D., also performed an independent medical evaluation. At the time of this evaluation, Mr. Shultz denied that he had any left shoulder injuries other than the compensable injury. Dr. Orvik found that Mr. Shultz's medical history included records from his 2007 motor vehicle accident which injured his left shoulder, but he noted that Mr. Shultz believed this injury had completely resolved. There is no indication in Dr. Orvik's evaluation that he took account or was aware of Mr. Shultz's home fall in 2009, which also affected his left shoulder. Dr. Orvik found that Mr. Shultz had reached his maximum degree of medical improvement. He also found that Mr. Shultz had 8% whole person impairment for loss of range of motion in his left shoulder under the American Medical Association's *Guides*. On October 10, 2014, the Office of Judges affirmed the claims administrator's decision granting Mr. Shultz a 3% permanent partial

¹ In its August 26, 2009, Order, the Office of Judges held the claim compensable for a left shoulder injury but concluded that the evidence was not sufficient to determine the exact diagnosis codes related to the injury. Based on the Office of Judges' Order, the claims administrator ultimately issued a notice that the claim was held compensable for left shoulder sprain, left rotator cuff sprain, and staphylococcus infection.

² Dr. Bal requested authorization and reimbursement for several of these treatments including an additional surgery. Mr. Shultz also requested temporary total disability benefits for the period he was unable to work while receiving these treatments. Dr. Bal's requests for medical authorization and Mr. Shultz's request for temporary total disability benefits was ultimately denied by the Office of Judges on July 29, 2011. The Board of Review affirmed the Office of Judges' Order on December 23, 2011, and this Court affirmed the Board of Review's decision in *Shultz v. Eastern Associated Coal Corporation*, No. 12-0086 (Nov. 7, 2013) (memorandum decision) because we found that Mr. Shultz's current disability and need for treatment was not related to his compensable injury.

disability award. The Board of Review affirmed the Office of Judges' Order on April 30, 2015, leading Mr. Shultz to appeal.

The Office of Judges concluded that Mr. Shultz has 3% whole person impairment related to his compensable left shoulder injury and that the claims administrator's grant of a 3% permanent partial disability award was appropriate. The Office of Judges based this determination on the evaluation of Dr. Sethi. It also considered the evaluation of Dr. Orvik, but it found that Dr. Sethi's impairment recommendation was more reliable. The Office of Judges specifically noted that Dr. Orvik appeared to be unaware of Mr. Shultz's significant, non-compensable, unrelated left shoulder injuries. 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. Mr. Shultz has not demonstrated that he is entitled to any greater than the 3% permanent partial disability award granted by the claims administrator. The evaluation of Dr. Sethi demonstrates that Mr. Shultz has 3% whole person impairment for loss of range of motion in his left shoulder. Dr. Sethi's calculation of Mr. Shultz's impairment complied with the directions of the American Medical Association's *Guides* and was sufficiently reliable to serve as the basis of the permanent partial disability award. Although the Office of Judges did not provide a full explanation of its reasons, the limitations the Office of Judges noted in Dr. Orvik's evaluation served as a sufficient basis for disregarding his alternative impairment rating. Because Dr. Orvik was apparently unaware of material portions of Mr. Shultz's medical history, including his non-compensable home fall which impacted his left shoulder, the Office of Judges was within its discretion in relying on Dr. Sethi's impairment recommendation in calculating the award.

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:

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

DISSENTING:

Chief Justice Menis E. Ketchum