

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

April 12, 2016

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

**FRANK R. MARRA,**  
**Claimant Below, Petitioner**

vs.) **No. 15-0562** (BOR Appeal No. 2050204)  
(Claim No. 2012001258)

**J F ALLEN COMPANY,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Frank R. Marra, by Robert Stultz, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. J F Allen Company, by Maureen Kowalski, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 15, 2015, in which the Board affirmed a January 5, 2015, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's January 24, 2014, decision granting Mr. Marra a 4.47% permanent partial disability award for occupationally-induced hearing loss. 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. Marra filed an application for workers' compensation benefits stemming from occupationally-induced hearing loss, and on December 17, 2011, the Office of Judges remanded the claim to the claims administrator with instructions to hold the claim compensable for occupationally-induced hearing loss and to refer Mr. Marra for an independent medical evaluation. In an Order dated August 19, 2013, the Office of Judges noted that Mr. Marra underwent audiometric testing performed in the office of J.I. Daristotle, M.D. The Office of Judges also noted that Douglas Chen, M.D., performed the independent medical evaluation

mandated by the Office of Judges in its December 17, 2011, Order, which also included audiometric testing. The Office of Judges determined that the audiograms performed by Dr. Daristotle's and Dr. Chen's staff exceeded the acceptable test/retest margin of error outlined in West Virginia Code of State Rules § 85-20-47.3 (2006) and, therefore, remanded the claim for another independent medical evaluation.

On November 5, 2013, Stephen Wetmore, M.D., performed the independent medical evaluation mandated by the Office of Judges in the August 19, 2013, Order. Dr. Wetmore stated that the audiogram performed by his staff revealed that Mr. Marra sustained 5.68% whole person impairment as a result of binaural hearing loss. He further opined that it is most reasonable to use the results of the audiometric testing performed by Dr. Daristotle's staff when determining the amount of hearing loss Mr. Marra sustained as a result of his occupation because Dr. Daristotle's staff performed its audiometric testing closest in time to Mr. Marra's date of last employment. He therefore opined that Mr. Marra sustained 4.47% whole person impairment as a result of occupationally-induced binaural hearing loss per the results of audiometric testing performed in Dr. Daristotle's office.

On January 24, 2014, the claims administrator granted Mr. Marra a 4.47% permanent partial disability award for occupationally-induced hearing loss. The Office of Judges affirmed the claims administrator's decision. In its Order dated May 15, 2015, the Board of Review affirmed the reasoning and conclusions of the Office of Judges. On appeal, Mr. Marra asserts that he is entitled to a total permanent partial disability award of 5.68% arising from occupationally-induced hearing loss.

The Office of Judges found that Dr. Wetmore's conclusions form a proper basis for the permanent partial disability award granted by the claims administrator. Mr. Marra has requested that this Court grant him a total permanent partial disability award of 5.68% based upon the audiogram performed by Dr. Wetmore's staff. However, Dr. Wetmore himself opined that after reviewing Mr. Marra's medical history, the calculation of 4.47% whole person impairment arising from testing performed by Dr. Daristotle's staff most accurately reflects the amount of hearing loss Mr. Marra incurred as a result of his employment. Dr. Wetmore further opined that 4.47%, not 5.68%, represents the amount of whole person impairment arising from binaural hearing loss that Mr. Marra sustained in the course of and resulting from his employment.

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 Allen H. Loughry II

**DISSENTING:**

Justice Margaret L. Workman