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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

MURRAY AMERICAN ENERGY, INC.,
Employer Below, Petitioner

vs.) No. 21-0219 (BOR Appeal No. 2055750)
(Claim No. 2019018682)

CHARLES ARNOLD,
Claimant Below, Respondent

MEMORANDUM DECISION

Petitioner Murray American Energy, Inc., by Counsel Aimee M. Stern, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). A response was not filed on behalf of Mr. Arnold.

The issue on appeal is permanent partial disability. The claims administrator granted a 1.65% permanent partial disability award on May 14, 2019. The Workers' Compensation Office of Judges ("Office of Judges") reversed the decision in its September 17, 2020, Order and granted a 2.65% permanent partial disability award. The Order was affirmed by the Board of Review on February 19, 2021.

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. We reverse the Board of Review's decision, which affirmed the decision of the Office of Judges granting Mr. Arnold a 2.65% permanent partial disability award. For the errors upon which we reverse, this case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion. W. Va. R. App. P. 21(d)

The standard of review applicable to this Court's consideration of workers' compensation appeals has been set out under W. Va. Code § 23-5-15, in relevant part, as follows:

> (c) In reviewing a decision of the Board of Review, the Supreme Court of Appeals shall consider the record provided by the board and give deference to the board's findings, reasoning, and conclusions . . . .
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> . . . .
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> (e) If the decision of the board effectively represents a reversal of a prior ruling of either the commission or the Office of Judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. The court may not conduct a de novo reweighing of the evidentiary record . . . .

See Hammons v. W. Va. Off. of Ins. Comm'r, 235 W. Va. 577, 582-83, 775 S.E.2d 458, 463-64 (2015). As we previously recognized in *Justice v. West Virginia Office Insurance Commission*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012), we apply a de novo standard of review to questions of law arising in the context of decisions issued by the Board. *See also Davies v. W. Va. Off. of Ins. Comm'r*, 227 W. Va. 330, 334, 708 S.E.2d 524, 528 (2011).

Mr. Arnold, a greaser in a coal mine, completed an Employees' and Physicians' Report of Occupational Hearing Loss on February 26, 2019, in which he indicated he retired from minework and was last exposed to industrial noise on February 18, 2019. He stated that he had twenty-five years of exposure to noise from working around explosives. Attached to the report was a February 26, 2019, audiogram conducted by Diana Daughertry, CCC-A. Four frequency air score was 170 on the right and 95 on the left. Speech reception was 80% at 70 decibels on the left and 100% of 65 on the right. Mr. Arnold was examined by John Wyllie, M.D., that day and was diagnosed with bilateral sensorineural hearing loss due to industrial noise exposure.

Laura Kraft, Human Resources Supervisor for the employer, provided Mr. Arnold's employment history on March 7, 2019. Mr. Arnold worked in coal mine from January 2004 until he retired in 2019. On May 1, 2019, Diane Rice, Au.D., SRT, performed audiometric testing which showed an air score of 155 on the right and 105 on the left. Speech discrimination was 76% on the right and 95% on the left. Stephen Wetmore, M.D., an otolaryngologist, examined Mr. Arnold and noted that Mr. Arnold worked in a noisy environment and his hearing loss was worse in the right ear, where the noisy equipment was closest. Dr. Wetmore found that Mr. Arnold's pattern of hearing loss was compatible with occupational noise exposure except for the somewhat worse hearing in the mid-tones. Dr. Wetmore assessed 1.65% impairment and recommended hearing aids. The claim was held compensable for noise-induced hearing loss on May 10, 2019.

The claims administrator granted a 1.65% permanent partial disability award on May 14, 2019. In its September 17, 2020, Order, the Office of Judges reversed the claims administrator's decision and granted a 2.65% permanent partial disability award. The Office of Judges reviewed

Dr. Wetmore's impairment assessment and found that he failed to adjust his four frequency air scores to include hearing loss due to other non-noise related causes. Dr. Wetmore did not include Mr. Arnold's speech discrimination scores in his impairment rating. The Office of Judges found that if such were taken into consideration, Dr. Wetmore's findings show 2.65% impairment. The Office of Judges found that Dr. Wyllie's impairment rating was partly illegible, and it could not be determined what impairment he found for monaural-right ear only. Further, Dr. Wyllie provided no explanation for his impairment findings. The Office of Judges found a significant difference between the right air scores found by Dr. Wyllie and Dr. Wetmore. However, the remainder of their reports showed similar findings. The Office of Judges concluded that Mr. Arnold was entitled to an additional 1% impairment based on Dr. Wetmore's failure to include speech discrimination scores in his rating. The Office of Judges noted that Dr. Wetmore provided no explanation for the exclusion of the scores and that he did not attribute the speech discrimination deficit to any nonoccupational conditions. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on February 19, 2021.

The Board's decision is the result of erroneous conclusion of law. West Virginia Code of State Rules § 85-20-47.1 clearly states that "…only physicians who are qualified otologists or otolaryngologists may interpret the result of audiograms in assessing the degree of the injured worker's noise-induced hearing loss impairment for the purpose of determining the percentages of the injured worker's whole person impairment, if any." Dr. Wetmore found 1.65% impairment and Dr. Wyllie's impairment assessment is illegible. No qualified physician of record found 2.65% impairment. The case is reversed and remanded with instructions to reinstate the claims administrator's grant of a 1.65% permanent partial disability award.

Reversed and Remanded.

ISSUED: May 26, 2022

CONCURRED IN BY:

Justice Elizabeth D. Walker
Justice Tim Armstead
Justice C. Haley Bunn

DISSENTING:

Chief Justice John A. Hutchison
Justice William R. Wooton

WOOTON, Justice, dissenting, and joined by Chief Justice Hutchison:

In this hearing loss case, petitioner Murray American Energy, Inc. appeals respondent Charles Arnold's permanent partial disability award. The majority reverses both the decisions of

the Office of Judges ("OOJ") and of the Board of Review ("BOR"), finding that Mr. Arnold was entitled to a permanent partial disability award of 2.65%, and reinstates the decision of the claims administrator finding that Mr. Arnold was only entitled to a 1.65% permanent partial disability award. As discussed *infra* in greater detail, reinstatement of the claims administrator's decision deprives Mr. Arnold of a statutorily mandated additional amount of his permanent partial disability award. *See* W. Va. Code § 24-4-6b(e). Therefore, I respectfully dissent.

West Virginia Code § 23-4-6b(e) expressly provides that

> *"[a]n additional amount of permanent partial disability shall be granted for impairment of speech discrimination*, if any, to determine the additional amount for binaural impairment, the percentage of speech discrimination in each ear shall be added together and the result divided by two to calculate the average percentage of speech discrimination, and the permanent partial disability shall be ascertained by reference to the percentage of permanent partial disability in the table below on the line with the percentage of speech discrimination obtained. To determine the additional amount for monaural impairment, the permanent partial disability shall be ascertained by reference to the percentage of permanent partial disability in the table below on the line with the percentage of speech discrimination in the injured ear.

Id. (emphasis added). The table provided in section 23-4-6b(e) indicates a 1% permanent partial disability award when the percentage of speech discrimination is "80% and up to but not including 90%." Moreover, West Virginia Code of State Rules § 85-20-47.1 requires that the audiometric testing include, inter alia, "speech discrimination."

In a carefully reasoned decision, the OOJ reversed the decision of the claims administrator with direction to grant Mr. Arnold an award of 2.65% permanent partial disability, finding that "Mr. Arnold has proven by a preponderance of the evidence that he is entitled to a 2.65% permanent partial disability award for occupational hearing loss." The OOJ noted that Dr. Stephen Wetmore, an otolaryngologist, found that Mr. Arnold was entitled to a 1.65% impairment. However, Dr. Wetmore failed to consider Mr. Arnold's speech discrimination scores of 76% on the right and 96% on the left; had Dr. Wetmore considered these scores, an additional 1% binaural hearing impairment would have been added to the award. The OOJ found that Dr. Wetmore provided no explanation for his failure to include Mr. Arnold's speech discrimination score in determining his overall hearing impairment.

Further, the OOJ considered the report from Dr. John W. Wyllie, who found that "[b]ased upon W. Va. Code 23-4-6B[,] Monaural compensable hearing loss" existed. However, Dr. Wyllie's recommended percentage of impairment due to work-related noise exposure was found by the OOJ to be "partly illegible." Nevertheless, in specific regard to the speech discrimination testing reported by Dr. Wyllie, the testing reflected "100% at 65db on the left and 80% at 70db on

the right," results which the OOJ found to be similar to Dr. Wetmore's speech discrimination results.

Even though the audiometric testing performed on Mr. Arnold by both doctors included the requisite "speech discrimination" component, the doctors failed to make the statutorily mandated award based upon the speech discrimination component. *See id*. § 23-4-6b(e). Specifically, the OOJ decision noted that "Dr. Wetmore's speech discrimination score of 76% on the right is consistent with Dr. Wyllie's score of 80% on the right." Thus, the OOJ adjusted Mr. Arnold's award based on the findings of the medical doctors to reach its decision that Mr. Arnold should have been awarded an additional 1% permanent partial disability award for a total award of 2.65%.

The OOJ did not base the additional 1% impairment awarded on its own interpretation of audiograms results, as implicitly suggested by the majority's reliance on West Virginia Code of State Rules § 85-20-47.1 ("only physicians who are qualified otologists or otolaryngologists may interpret the result of audiograms in assessing the degree of the injured worker's noise-induced hearing loss impairment for the purpose of determining the percentages of the injured worker's whole person impairment, if any."), but on the provisions of section 24-4-6b(e), which requires that an additional amount of permanent partial disability be awarded for impairment of speech discrimination. In applying the statutory provision to the facts before it, the OOJ relied on the results reported by Dr. Wetmore and Dr. Wyllie; it did not interpret those results. Thus, the majority's determination that the OOJ interpreted the audiograms performed on Mr. Arnold in contravention of West Virginia Code of State Rules § 85-20-47.1 simply ignores what actually occurred in this case – the OOJ and the BOR gave Mr. Arnold the statutorily mandated benefit that he was unquestionably entitled to receive. As the OOJ reasoned, West Virginia Code § 23-4-1g requires that the resolution of any issue "shall be based upon a weighing of all the evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution." This is exactly what the OOJ and the BOR did in this case. The decisions of both the OOJ and the BOR should have been affirmed. Accordingly, I respectfully dissent.

I am authorized to state that Chief Justice Hutchison joins in this dissent.