

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Brenda Cox,
Claimant Below, Petitioner

vs.) **No. 21-0755** (BOR Appeal No. 2056471)
(Claim No. 2017025733)

Nicholas County Board of Education,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Brenda Cox appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Nicholas County Board of Education filed a timely response.¹ The issue on appeal is permanent partial disability. The claimant argues that the Office of Judges, and by extension the Board of Review, improperly weighed the evidence. She asserts that she is entitled to a 20% permanent partial disability award. The claims administrator granted a 14% permanent partial disability award on December 11, 2018. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the decision in its March 8, 2021, Order. The Order was affirmed by the Board of Review on September 17, 2021. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the Board of Review's decision is appropriate. *See* W. Va. R. App. P. 21.

Ms. Cox, a school bus driver, injured her left hip, left knee, and lumbar spine in the course of her employment on March 14, 2017, when she jumped into an unattended car to prevent it from hitting a bus. On January 25, 2018, Ms. Cox underwent an authorized L3-4 microdiscectomy. She also underwent an authorized left knee arthroscopy and meniscectomy on June 21, 2018.

Joseph Grady, M.D., performed an independent medical evaluation on October 16, 2018, in which he assessed 11% lumbar impairment from Table 75 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, (4th ed. 1993) ("AMA Guides"). He found an additional 6% impairment for range of motion loss. He then placed Ms. Cox in Lumbar Category III from West Virginia Code of State Rules § 85-20-C and adjusted the rating to 13% impairment. Dr. Grady found no ratable impairment for the left hip. For the left knee, Dr. Grady found 1% impairment under Table 64 of the AMA *Guides* for Ms. Cox's meniscectomy. Dr.

¹Petitioner, Ms. Cox, is represented by Reginald D. Henry, and respondent, Nicholas County Board of Education, is represented by Lisa Warner Hunter.

Grady's total impairment recommendation was 14%. On December 11, 2018, the claims administrator granted a 14% permanent partial disability award based on Dr. Grady's report.

On August 6, 2019, Michael Kominsky, D.C., performed an independent medical evaluation in which he found 11% lumbar spine impairment under Table 75 of the *AMA Guides* and 8% impairment for range of motion loss. He then placed Ms. Cox in Lumbar Category III from West Virginia Code of State Rules § 85-20-C and adjusted the rating to 13% impairment. Dr. Kominsky assessed 4% impairment for range of motion loss in the left hip and 4% for range of motion loss in the left knee. His total combined impairment rating for the compensable injury was 19%.

Robert Walker, M.D., performed an independent medical evaluation on June 15, 2020, in which he assessed 10% lumbar spine impairment under Table 75 of the *AMA Guides*, 12% for range of motion loss, and 4% for lumbar radiculopathy. He then placed Ms. Cox in Lumbar Category III from West Virginia Code of State Rules § 85-20-C and adjusted the rating to 13% whole person impairment. Dr. Walker found 8% impairment in the left knee for range of motion loss. His total impairment assessment was 20%.

In a September 17, 2020, independent medical evaluation, Christopher Martin, M.D., assessed 11% lumbar impairment under Table 75 of the *AMA Guides* and 4% impairment for range of motion loss. He then placed Ms. Cox in lumbar Category III from West Virginia Code of State Rules § 85-20-C and adjusted the rating to 13%. Dr. Martin stated that he was unable to obtain valid range of motion measurements for the left hip. He noted that Ms. Cox received no specific treatment for her left hip and there was no evidence of acute trauma to the hip on x-rays. He therefore felt that there was no impairment indicated for the left hip. For the left knee, Dr. Martin found 1% impairment under Table 64 of the *AMA Guides* for the meniscectomy. He noted that range of motion measurements in the left knee were within normal limits.

Dr. Martin also reviewed the reports of Drs. Grady and Kominsky. He stated that Dr. Kominsky's findings were unsupported by the objective evidence. Dr. Kominsky found impairment for left hip range of motion, which Dr. Martin did not find on examination. Further, Dr. Kominsky found impairment for left knee range of motion abnormalities, which neither Dr. Martin nor Dr. Grady found. Dr. Martin noted that when Ms. Cox last saw her knee surgeon, her measured flexion was normal. Dr. Martin opined that Dr. Kominsky's finding of impairment for left knee range of motion loss was unsupported by objective medical evidence.

In its March 8, 2021, Order, the Office of Judges affirmed the claims administrator's grant of a 14% permanent partial disability award. It found that every physician of record found 13% lumbar spine impairment so that is not at issue. Regarding the left hip, Dr. Kominsky was the only physician of record to find 4% impairment. Drs. Grady, Walker, and Martin all found no ratable impairment. The Office of Judges concluded that a preponderance of the evidence indicates Ms. Cox has no left hip impairment.

For the left knee, the Office of Judges found that Drs. Grady and Martin found 1% impairment for the meniscectomy, Dr. Kominsky found 4% for range of motion loss, and Dr.

Walker found 8% for range of motion loss. The Office of Judges concluded that the weight of the medical evidence does not support Drs. Kominsky and Walker's findings of left knee range of motion limitations. It noted that Drs. Grady and Martin, as well as Ms. Cox's treating orthopedic surgeon, all found Ms. Cox's left knee range of motion to be within normal limits. The Office of Judges concluded that Drs. Grady and Martin's finding of 1% impairment for Ms. Cox's meniscectomy was supported by the evidentiary record because Table 64 of the *AMA Guides* states that 1% impairment is indicated for such surgeries. Based upon a preponderance of the record, the Office of Judges found that Ms. Cox was fully compensated by her 14% permanent partial disability award. The Board of Review affirmed the Office of Judges' Order on September 17, 2021.

This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review, and when the Board's decision affirms prior rulings by both the Workers' Compensation Commission and the Office of Judges, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is based upon a material misstatement or mischaracterization of the evidentiary record. *See* W. Va. Code § 23-5-15(c) & (d). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. of Ins. Comm'r*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. There is no question that Ms. Cox suffered 13% lumbar spine impairment as every physician of record found. For the left hip, Dr. Kominsky was the only physician of record to find impairment, and his finding is not supported by the evidence of record. The record does show, however, that Ms. Cox sustained 1% left knee impairment. Though Drs. Kominsky and Walker found impairment for range of motion loss, Drs. Grady, Martin, and Ms. Cox's treating orthopedic surgeon all stated that Ms. Cox's range of motion was within normal limits. Therefore, she was only entitled to 1% impairment for her meniscectomy. Ms. Cox has been fully compensated by her 14% permanent partial disability award.

Affirmed.

ISSUED: June 13, 2023

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn