

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

SHANNON M. ROWND, Petitioner

July 20, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0143 (BOR Appeal No. 2044798)
(Claim No. 2008022307)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WHEELING HOSPITAL, INC., Respondent**

MEMORANDUM DECISION

Petitioner, Shannon M. Rownd, by M. Jane Glauser, her attorney, appeals the Board of Review Order granting her a 5% permanent partial disability award. Wheeling Hospital, Inc., by Jennifer B. Hagerdorn, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 22, 2010, in which the Board affirmed a June 18, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's award of 5% permanent partial disability. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Having considered the petition, response, and the relevant decision of the lower tribunal, the Court is of the opinion that 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 that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

The Board of Review held the claims administrator and Office of Judges did not err in granting Ms. Rownd a 5% permanent partial disability award for her lumbar spine injury. On December 3, 2007, Ms. Rownd asserts she was bending over a patient when she experienced lumbar spine pain radiating down her left leg. Ms. Rownd was hospitalized on the date of injury (December 3, 2007), January 13, 2008, and May 7, 2008, for intractable low back pain. On July 7, 2008, Dr. Sushil M. Sethi, M.D. evaluated Ms. Rownd and opined she was not at maximum medical improvement and should continue treatment with Dr. Gabriel E. Sella until such time as she reached

maximum medical improvement. Dr. Sella opined Ms. Rownd suffers from bilateral quadratus lumborum and SI joint, moderate to severe sudomotor changes and hypertonus, and trigger points to the SI joint, bilaterally. Ms. Rownd denied being told her continued complaints were related to degenerative disc disease by Dr. Hargraves, instead asserting Dr. Hargraves informed her the complaints appeared related to the compensable lumbar strain.

On April 27, 2009, Dr. Sethi performed an additional independent medical evaluation. It was Dr. Sethi's considered opinion that Ms. Rownd's continued symptoms corresponded to the degenerative disc disease and not the work-related injury. Based on the results of the evaluation, Dr. Sethi opined Ms. Rownd falls under DRE Table 72, Category II for a 5% impairment and assigned 5% impairment for range of motion limitations. Dr. Sethi also found 0% impairment pursuant to Table 75, page 113, American Medical Association's, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), without explanation.

On September 3, 2009, Dr. Bruce A Guberman, M.D., evaluated Ms. Rownd and noted the degenerative disc disease and prior MRI diagnosis of annular tears at L3-4 and L5-S1. Dr. Guberman opined Ms. Rownd suffers from a 5% impairment pursuant to Table 75, page 113 and 5% range of motion impairment for a total impairment of 10%. According to the respective reports, Dr. Sethi found 5% impairment pursuant to West Virginia Code of State Rules § 85-20-C and Dr. Guberman assigned 8% impairment.

The Office of Judges held Ms. Rownd's current complaints revolved around the mild degenerative disc disease and not from the work-related injury as set forth in Dr. Sethi's report. This opinion is supported by Dr. Hargrave's May 7, 2008, report finding the complaints on that date related to acute exacerbation of the low back secondary to degenerative disc at L3-4 and L5-S1. When considering Dr. Guberman's report, the Office of Judges found the opinion inconsistent with the medical evidence of record. "The complaints [Ms. Rownd] has now are related to non-compensable degenerative problems as noted by MRI." The Office of Judges affirmed the claims administrator's 5% permanent partial disability award, and the Board of Review reached the same conclusion in its December 22, 2010, Order.

Dr. Sethi's report does not contain an impairment rating pursuant to Table 75, page 113 of the American Medical Association's, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), because Dr. Sethi did not feel the degenerative disc disease should be used to determine Ms. Rownd's impairment. Dr. Guberman included an assessment of injury pursuant to Table 75, however, none of the impairment was attributed to the degenerative disc disease. "The evidentiary weight to be given to a report will be determined by how well it demonstrates that the evaluation and examination that it memorializes were conducted in accordance with the applicable Guides and that the opinion with regard to the degree of permanent whole body medical impairment suffered by an injured worker was arrived at and composed in accordance with the requirements of the applicable Guides." West Virginia Code of State Rules § 85-20-66.1. Dr. Sethi's report clearly does not follow the appropriate guidelines for determining impairment and also improperly utilized the DRE model. This Court held in *Repass v. Worker's Compensation Div.*, 212 W.Va. 86, 569 S.E.2d 162 (2002),

that the DRE model cannot be reconciled with several specific workers compensation statutes promulgated by the West Virginia Legislature, any medical examination conducted in accordance with this model is invalid and unreliable. Based on the requirements set forth in West Virginia Code of State Rules § 85-20-66.1, Ms. Rownd is entitled to an additional 3% permanent partial disability award as set forth in Dr. Guberman's report.

For the foregoing reasons, we find that the decision of the Board of Review is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, and is based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the Court reverses the Board of Review Order granting Ms. Rownd 5% permanent partial disability and grants an additional 3% permanent partial disability as set forth in Dr. Guberman's report.

Reversed and Remanded.

ISSUED: **July 20, 2012**

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Margaret L. Workman

DISSENTING:

Justice Thomas E. McHugh

Justice Brent D. Benjamin not participating