

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 7, 2015

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

PAMELA PERINE,
Claimant Below, Petitioner

vs.) **No. 14-0709** (BOR Appeal No. 2049121)
(Claim No. 2010135583)

CABELL HUNTINGTON HOSPITAL, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Pamela Perine, by Edwin H. Pancake, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Cabell Huntington Hospital, Inc., by Toni J. Minner, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated July 3, 2014, in which the Board affirmed a December 20, 2013, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's July 20, 2012, decision granting Ms. Perine a 20% permanent partial disability award. In its Order, the Office of Judges also affirmed the claims administrator's March 14, 2013, decision denying Ms. Perine's request for temporary partial rehabilitation benefits.¹ 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.

Ms. Perine worked as a registered nurse for Cabell Huntington Hospital, Inc. On May 28, 2010, Ms. Perine experienced pain in her lower back radiating into her left leg when she was helping perform a total knee replacement. The claim was held compensable for back sprain. Ms. Perine had three independent medical evaluations. Ms. Perine underwent laminectomy with

¹ Ms. Perine is not appealing the Board of Review and the Office of Judges' affirming of the claims administrator's March 14, 2013, denial for temporary partial rehabilitation benefits.

partial discectomy on the left side at the L4-L5 level on July 21, 2011, and she also underwent a decompression laminectomy and a posterior spinal fusion at the L4-L5 level on April 10, 2012. First, Paul Bachwitt, M.D., examined Ms. Perine and found she has 20% whole person impairment for the lumbar spine. Then, Bruce Guberman, M.D., examined Ms. Perine and opined that she has 25% whole person impairment of the lumbar spine. Dr. Guberman recommended an additional 5% permanent partial disability award since Ms. Perine has already received a 20% award. Third, D. Kelly Agnew, M.D., examined Ms. Perine and determined that she has 20% whole person impairment. Ms. Perine filed an application for a permanent partial disability award, and on July 20, 2012, the claims administrator granted her a 20% permanent partial disability award based on the report of Dr. Bachwitt.

The Office of Judges affirmed the claims administrator's decision and found Ms. Perine has 20% whole person impairment for the lumbar spine. The Board of Review affirmed the Order of the Office of Judges. On appeal, Ms. Perine disagrees and asserts that Dr. Guberman is the only physician that placed her in the proper lumbar category under West Virginia Code of State Rules Table § 85-20-C (2006) and that the reports of Dr. Bachwitt and Dr. Agnew are incorrect because they placed her in the wrong lumbar category. Ms. Perine further asserts that she is entitled to an additional 5% permanent partial disability award as found by Dr. Guberman. Cabell Huntington Hospital, Inc., maintains that Ms. Perine is not entitled to a 25% permanent partial disability award and that the preponderance of the evidence, specifically the opinions of Dr. Bachwitt and Dr. Agnew, demonstrate that she is entitled to a 20% permanent partial disability award.

The Office of Judges noted that Dr. Bachwitt and Dr. Agnew placed Ms. Perine in Lumbar Spine Category IV of West Virginia Code of State Rules Table § 85-20-C but Dr. Guberman placed her in Lumbar Spine Category V of West Virginia Code of State Rules Table § 85-20-C. Dr. Agnew testified that Ms. Perine only has some modest sensory changes, no reflex changes, no atrophy, and no anatomic radicular motor loss. Dr. Agnew further testified that Dr. Guberman was wrong to place Ms. Perine into Category V because she does not satisfy the requirement of significant lower extremity impairment as required for Category V. The Office of Judges relied on Dr. Agnew's testimony and found Ms. Perine does not satisfy the requirements of Lumbar Spine Category V. The Office of Judges found the recommendations of Dr. Bachwitt and Dr. Agnew to be persuasive and therefore found Ms. Perine has 20% whole person impairment for the lumbar spine. The Board of Review agreed with the Office of Judges.

After review, we agree with the reasoning of the Office of Judges and the conclusions of the Board of Review. Dr. Agnew testified that Ms. Perine does not satisfy the Lumbar Spine Category V requirement of significant lower extremity impairment. Dr. Agnew found that Ms. Perine walks without a limp and only uses over-the-counter medication during the day and a homeopathic dose of Flexeril at night. Dr. Agnew testified that Ms. Perine had a successful fusion and that the guidelines would not even elevate an unsuccessful fusion to Lumbar Spine Category V. Dr. Agnew and Dr. Bachwitt both placed Ms. Perine into Lumbar Spine Category IV and both recommended 20% whole person impairment for the lumbar spine.

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: May 7, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum