

Supreme Court No. 11-0612

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

DEXTER L. GORE,
Petitioner,

v.

BOR Appeal No. 2045475
Supreme Court No.: 11-0612
Claim No. 990055401
D.O.I. 03/01/1999

OFFICE OF THE INSURANCE COMMISSIONER OF W.VA.,
IN ITS' CAPACITY AS ADMINISTRATOR OF THE OLD FUND,

and

BOONE COUNTY PARKS AND RECREATION COMMISSION,
Respondents.

RESPONSE PETITION FOR REVIEW ON BEHALF
OF
THE OFFICE OF INSURANCE COMMISSIONER

INSURANCE COMMISSIONER OF WV
IN ITS CAPACITY AS
ADMINISTRATOR OF THE OLD
FUND,

By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DEXTER L. GORE,
Appellant,

Sup.Ct.No. 11-0612
BOR Appeal No. 2045475
Claim 03/01/1999

v.

THE WEST VIRGINIA INSURANCE COMMISSIONER,
in its capacity as ADMINISTRATOR of the OLD FUND,

and

BOONE COUNTY PARKS AND RECREATION COMMISSION,
Appellees.

**APPELLEE BRIEF ON BEHALF OF WEST VIRGINIA
INSURANCE COMMISSIONER / OLD FUND**

I. STATEMENT OF THE CASE

The West Virginia Insurance Commissioner, in its capacity as Administrator of the Workers' Compensation Old Fund, herein submits its Appellee Brief to the claimant's/appellant's Appeal from the Workers' Compensation Board of Review Order dated March 31, 2011, which affirmed the Decision of the Workers' Compensation Office of Judges dated January 4, 2011. The Administrative Law Judge's decision likewise affirmed the Claims Administrator's Order of January 13, 2010, which granted a 13% permanent partial disability award to the claimant.

It is the Insurance Commissioner's position, by counsel, that the Board of Review's Order dated March 31, 2011 be affirmed by this Honorable Court.

II. STATEMENT OF FACTS

In its March 31, 2011 Order in the above-styled claim, the Workers' Compensation Board of Review adopted the findings of fact and conclusions of law of the Administrative Law Judge's Decision dated January 4, 2011. Counsel for the Insurance Commissioner also adopts and incorporates the "Findings of Fact" as asserted by the Administrative Law Judge in the January 4, 2011 Decision.

III STANDARD OF REVIEW

West Virginia Code §23-5-15(c) and (d) sets the standard for a review of a decision of the Board of Review by the Supreme Court of Appeals. The statute says that the Court can reverse or modify the decision if it finds that the decision was either (1) in clear violation of a constitutional or statutory provision, or (2) clearly the result of an erroneous conclusion of law. On questions of law, therefore, the standard is de novo. The Supreme Court of Appeals' adherence to all of these principles has been recently set forth in the Court's opinion in *Lovas v. Consolidation Coal Co.*, ___ S.E.2d ___, WL 2168925 (W. Va. 2008).

On questions of fact, the standard varies on the pattern of the rulings below. If the Board of Review's decision effectively affirmed the rulings of both the Office of Judges and the Commission, then the standard of review is very limited. In such a case, the Court can reverse or modify the board's decision only if it finds that the Board's decision was based on a material misstatement or mischaracterization of particular components of the evidentiary record. *This is the circumstance in the instant appeal.*

If the Board's decision effectively represents a reversal of the decision of either the Commission or the Office of Judges, then the standard of review is less limited. The statute says that in this circumstance, the Court can reverse or modify the decision only if it finds that the

Board's findings were so clearly wrong based on 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.

In either situation of an alleged error of fact, the Court, "may not conduct a de novo reweighing of the evidentiary record."

IV. ARGUMENT

The claimant's/appellant's Brief lists one issue in the claimant's Petition for Appeal to the Supreme Court. This response goes to all matters raised by claimant: the claimant's argument that the claimant is entitled to an additional 5% permanent partial disability award should be rejected.

Claimant's argument that Claims Administrator had no valid authority to reduce permanent partial disability awards below whole person impairment levels and that any rule supporting such action is in direct conflict with West Virginia Code §23-4-6(i) not adherent to statutory and regulatory support for such adjustment, and fails to show error in the prior decisions.

Dexter Gore, a superintendent with the Boone County Parks and Recreation Commission, injured his lower back on March 1, 1999, when he was picking up cinder blocks. His claim was held compensable for lumbosacral sprain (diagnosis code 846.0) by order of the West Virginia Bureau of Employment Programs on April 5, 1999. The claimant was provided with conservative treatment of doctor's visits, medications and physical therapy. Eventually, Dr. Schmidt, the appellant's treating physician requested authorization for surgery. The surgery, a lumbar laminectomy and discectomy, was performed at Charleston Area Medical Center. The appellant returned to work six months after his injury

Mr. Gore was seen by Dr. Ramanathan Padmanaban, in October 2009, for the purpose of an independent medical evaluation. Dr. Padmanaban found the claimant to be at maximum

medical improvement and determined that the appellant was ready for an impairment rating. Dr. Padmanaban determined Mr. Gore's impairment rating using the AMA Guide Fourth Edition as well as Rule 20, Section VII tables. Dr. Padmanaban asserted that using the range of motion model from AMA Guide Fourth Edition, Mr. Gore's impairment rating was 18% whole person impairment. Further, using Rule 20, Section VII tables, §85-20-C, the appellant was at lumbar category III, which gave him a range of 10 to 13% whole person impairment. Dr. Padmanaban went on to assert that since the appellant's impairment using the range of motion modes was 18% and he had a lumbar laminectomy and discectomy and also still has residual symptoms, that he would rate him as 13% whole person impairment since West Virginia Workers' Compensation uses Rule 20, Section VII tables for impairment rating, the appellant's impairment rating was 13% whole person impairment, in Dr. Padmanaban's opinion. Dr. Padmanaban went on to recommend that Sedgwick CMS award the appellant 13% whole person impairment for his March 1, 1999 lumbosacral injury. The approved patient history form for back pain was completed by Mr. Padmanaban at the time of the IME. The approved back examination form was also completed by Dr. Padmanaban. Thereafter, on January 13, 2010, the claimant was given a permanent partial disability award.

Dr. Padmanaban conducted a thorough physical examination of the appellant. Additionally, Dr. Padmanaban had access to and reviewed pertinent records and test results including the lumbar MRI, the treatment notes of the treating physician and the surgeon, and numerous physical therapy notes. Dr. Padmanaban found that Mr. Gore was at maximum medical improvement.

The appellant entered as evidence at the Office of Judges the same report that he is now arguing against. Both the appellant, as well as the Insurance Commissioner, submitted Dr. Padmanaban's October 2009 IME report into evidence at the OOJ.

At the OOJ, the ALJ asserted in the January 4, 2011 decision that "claimant's counsel submitted a closing argument contending that Rule 85-20-64.1 is unlawful since it provides for the reduction of permanent partial disability assessments based upon preconceived ranges of impairment regardless of the extent of medical impairment the claimant actually received. Therefore, claimant's counsel contends the claimant is entitled to an 18% permanent partial disability award as opposed to a 13% permanent partial disability award." The ALJ went on to opine that the "claimant was granted a 13% award in accordance with the recommendation of Dr. Padmanaban, who properly referenced the AMA Guides, Fourth Edition and Rule 20. In addition, Dr. Padmanaban conducted a complete and thorough evaluation of the claimant and his medical records." The ALJ went on to state that there was "no medical evidence of record to refute the findings and conclusions of Dr. Padmanaban" and there was also "no evidence to indicate the report of Dr. Padmanaban is unreliable." The ALJ concluded that "[s]ince the date of the award examination was after June 14, 2004, Rule 20 is controlling" and that the OOJ "has no authority to determine the legality of Rule 20"; therefore, "[u]pon consideration of the aforesaid, a preponderance of the evidence would dictate the Claim Administrator's Order of January 13, 2010 should be affirmed."

The claims administrator entered an order on January 13, 2010, finding that the claimant a 13% whole person impairment, resulting in a PPD award of 13%. The Office of Judges upheld the claims administrator's order by a decision dated January 4, 2011. The Board of Review also affirmed the Decision of the Office of Judges which affirmed the Claims Administrator's order

of January 13, 2010. The Commissioner requests that the Board of Review's order of March 31, 2011 be affirmed, and the appellant's petition for appeal before this Honorable Court be rejected.

The appellant bears the burden of proving by a preponderance of the evidence that he is entitled to any additional permanent partial disability award beyond what he has already received. The ALJ and Board of Review properly affirmed the claims administrator's order finding that the appellant had been entitled to 13% permanent partial disability award, as opposed to the 18% that the appellant is requesting.

Preponderance of the evidence means proof that something is more likely so than not so. A preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence is not determined by counting items of evidence. It is determined by assessing the persuasiveness of the evidence. W. Va. Code §23-4-1g provides that the resolution of issues in workers compensation litigation 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. The process of weighing evidence includes, but is not limited to an assessment of the relevance, credibility, materiality, and reliability that the evidence possesses. The resolution of issues must be on merit, and not according to any principle that requires workers' compensation statutes to be construed liberally because they are remedial in nature.

The evidentiary weight to be given to a report will be determined by how well it demonstrates that the evaluation and examination it memorializes were conducted with the applicable Guides. CSR 85-20-66.1. The report must state the factual findings of all tests, evaluations and examinations that were conducted and must state the manner in which they were conducted so as to clearly indicate their performance in keeping with the requirements of the

Guides. After the effective date of Rule 20, all examinations with regard to the degree of permanent whole body impairment which an injured worker has suffered shall be conducted in accordance with the AMA Guides, 4th Edition. CSR 85-20-65.1. The revised rules were not applicable to examinations performed prior to the date of the Rule (June 14, 2004), but are applicable to examinations performed after the effective date of Rule 20. The evidentiary requirements contained in CSR 85-20-66 provide that for any evaluation and examination of a compensable back injury, the back examination form MUST be completed and submitted with the narrative report. A report and opinion submitted regarding the degree of permanent whole body medical impairment as a result of a back injury without a completed back examination form shall be disregarded. 85-20-66.2. Additionally, CSR 85-20-64.1 adopted ranges for common injuries and diseases. Permanent partial disability assessments are determined based upon the range of motion models contained in the Guides Fourth. Once an impairment level has been determined by range of motion assessment, that level will be compared with the ranges set forth in other portions of the Rule. Permanent partial disability assessments in excess of the range provided in the appropriate category shall be reduced to, in the case of lumbar spine impairments §64.2, referring the examiner to Table § 85-20-C. The rating physician must identify the appropriate impairment category and then assign impairment within the range.

Dr. Padmanaban followed all of the protocol outlined above when he found that the appellant had an 18% whole person impairment according to the combined value chart on Page 322 of the AMA Guide Fourth Edition. However, Dr. Padmanaban also correctly reduced the appellant's impairment rating based upon Rule 20, Table § 85-20-C, since the date of the independent medical examination was **after** the effective date of the rule, which was June 14, 2004. Therefore, the appellant's attempt to discredit the impairment rating determined by Dr.

Padmanaban should fail because all of the proper procedures were followed by Dr. Padmanaban in his evaluation of the appellant. Moreover, if the appellant had such issue with the IME conducted by Dr. Padmanaban, additional evidence or an additional IME report should have been obtained to attempt to discredit Dr. Padmanaban's impairment rating of the appellant. Therefore, the appellant's argument is weakened because he depends upon Dr. Padmanaban's IME evaluation until the impairment rating is reduced from 18% to 13%; but, that was the proper protocol to follow under the AMA Guides Fourth Edition, but also under Rule 20.

Therefore, the only credible evidence of record demonstrating the appellant's current physical condition is the report of Dr. Ramanathan Padmanaban which took place on October 27, 2009. Dr. Padmanaban completed and supplied the mandatory low back form. Dr. Padmanaban determined and documented a range of motion recommendation in accordance with the AMA Guides, 4th Edition. Dr. Padmanaban then applied Rule 20, as required, placing the claimant within Lumbar Category III, with an impairment of 13%, which is the maximum allowed in that Category.

Therefore, the ALJ and Board of Review properly affirmed the claim administrator's order granting the 13% impairment to the appellant. Dr. Padmanaban's report, also performed after the adoption of Rule 20 does supply the mandatory low back form, and therefore his report meets the evidentiary requirements of Rule 20. His examination also correlates his range of motion findings under the AMA Guides to the Tables contained in Rule 20, which is also mandatory for examinations performed after June, 2004. Therefore, the evaluation and impairment recommendations of Dr. Padmanaban's report constituted the credible determinative evidentiary foundation for resolution of the protest.

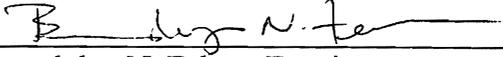
Therefore, by a preponderance of the evidence in this claim which meets the evidentiary standards of Rule 20, the conclusion of Dr. Padmanaban that the appellant is only entitled to a 13% permanent partial disability award was correctly relied upon by the ALJ in affirming the claims administrator's order that the claimant was entitled to a 13% permanent partial disability award.

The appellant's Brief fails to demonstrate any cause for disturbing the prior decisions made by the Administrative Law Judge and Board of Review. The claimant's appeal has demonstrated no errors of fact or law in those prior decisions.

V. CONCLUSION

WHEREFORE, in that this claim was adjudicated in accordance with governing West Virginia Workers' Compensation Law, the Commissioner PRAYS that, based upon the foregoing reasons, this Honorable Court AFFIRM the March 31, 2011, Order of the Workers' Compensation Board of Review, and REFUSE the appellant's petition for review before this Honorable Court

THE WEST VIRGINIA INSURANCE
COMMISSIONER, in its capacity as
ADMINISTRATOR of the OLD FUND
By Counsel,



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CERTIFICATE OF SERVICE

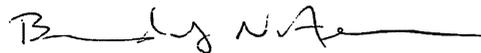
I, Brandolyn N. Felton, Legal Counsel to the Insurance Commissioner of WV in its capacity as administrator of the Old Fund, do hereby certify that copies of the foregoing "Response Brief" were served upon the parties of record this 26th day of April 2011, by United States Mail, to the following persons properly addressed as follows:

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