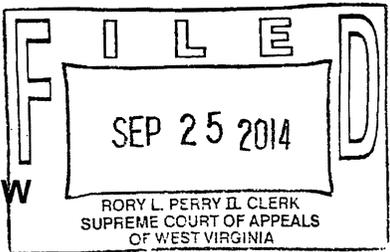


14-0977

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STATE OF WEST VIRGINIA WORKERS' COMPENSATION BOARD OF REVIEW



KEVIN S. GOFF,
Appellant

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Appeal No. 2049243
JCN: 2011027511
DOI 02/06/2011

v.

WV DIVISION OF NATURAL RESOURCES,
Appellee

ORDER

The following case is an appeal by the claimant from a final order of the Workers' Compensation Office of Judges dated February 11, 2014, which affirmed the claims administrator's order dated December 21, 2012, granting no additional permanent partial disability award.

The Workers' Compensation Board of Review has completed a thorough review of the record, briefs, and arguments. As required, the Workers' Compensation Board of Review has evaluated the decision of the Office of Judges in light of the standard of review contained in West Virginia Code § 23-5-12, as well as the applicable statutory language as interpreted by the West Virginia Supreme Court of Appeals.

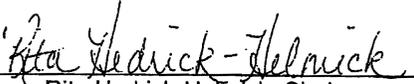
Upon our review of this case, we have determined to affirm the decision of the Office of Judges. The Board adopts the findings of fact and conclusions of law of the Administrative Law Judge's Decision dated February 11, 2014, which relate to the issue on appeal, and the same are incorporated herein by reference, made a part hereof, and are ratified, confirmed and approved.



Accordingly, it is ORDERED that the final order of the Workers' Compensation Office of Judges dated February 11, 2014, is hereby AFFIRMED.

From any final decision of the Board, including any order of remand, an application for review may be prosecuted by any party to the Supreme Court of Appeals within thirty days from the date of this order. The appeal shall be filed with Rory L. Perry, II, Clerk of the West Virginia Supreme Court of Appeals, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

DATED: AUGUST 26, 2014


Rita Hedrick-Helmick, Chairperson

cc: KEVIN S. GOFF
JONATHAN C. BOWMAN
WV DIVISION OF NATURAL RESOURCES
LUCINDA FLUHARTY
BRICKSTREET MUTUAL

**STATE OF WEST VIRGINIA
WORKERS' COMPENSATION OFFICE OF JUDGES**

IN THE MATTER OF:

Kevin S. Goff,
CLAIMANT

JCN: 2011027511

CCN: 2011002265

and

DOI: 2-6-2011

WV Division of Natural Resources,
EMPLOYER

DECISION OF ADMINISTRATIVE LAW JUDGE

PARTIES:

Claimant, Kevin S. Goff, by counsel, Jonathan C. Bowman
Employer, WV Division of Natural Resources, by counsel, Timothy Huffman

ISSUE:

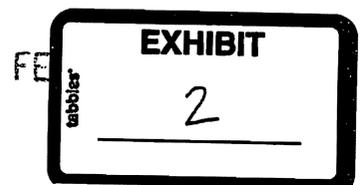
The claimant protested the Claim Administrator's Order dated December 21, 2012, which granted no additional permanent partial disability (PPD).

DECISION:

It is hereby ORDERED that the Claim Administrator's Order dated December 21, 2012, granting the claimant no additional PPD award, be AFFIRMED.

RECORD CONSIDERED:

See attached, Record Considered.



FINDINGS OF FACT:

1. The claimant, Kevin S. Goff, while working as a Natural Resource Police Officer for the employer, WV Division of Natural Resources, sustained an injury to his right eye when he was struck with a briar.

2. The claimant submitted the February 3, 2010 through January 16, 2013 treatment records from John Tellers, M.D., wherein the claimant was being treated for visual distortion and migraines with aura. The claimant had complaints of blurry vision, déjà vu sensations, impaired thinking, and headaches consistent with complicated migraines. Dr. Tellers opined that not much else could be done for the claimant however he noted that he would continue to improve over the next five years. He indicated the claimant could return to work as of 1/17/2013.

3. The claimant submitted the July 5, 2011 through November 27, 2012 treatment records from Bradley Miller, D.O., wherein the claimant was being treated for cervical and lumbar strain s/p MVA, chronic abdominal pain and intermittent diarrhea, abnormal CT of the abdomen and pelvis showing sub centimeter lymph nodes and or possible mesenteric panniculitis, degenerative disease of the cervical spine with disc bulging at C3-4 per MRI, right shoulder pain, history of migraine with aura, s/p right enucleation for endophthalmitis on 2/21/11 and right lower lid ectropion repair on 4/29/11 with right eye posthesis.

4. The claimant submitted the December 22, 2011 Progress note from John Nguyen, M.D., which showed the claimant presented with complaints of intermittent flashing lights out of the right socket. The impression was traumatic enucleation of eye, anophthalmia, Hx of Lasik, Giant papillary conjunctivitis. The claimant was referred for a prosthesis refit and color.

5. The claimant submitted the January 30, 2012 report from Walter Tillman, B.C.O., F.A.S.O. Dr. Tillman requested authorization for the claimant to have his prosthesis enlarged. He noted that the claimant's eyelid was beginning to fall over his prosthesis and needed an adjustment. Dr. Tillman indicated that the prosthesis would sometimes settle over several months and begin to become too small for the socket and would therefore need to be enlarged.

6. The claimant submitted the February 29, 2012 Progress notes from Dr. Nguyen. Dr. Nguyen noted the claimant began taking Durezol after the last visit but started getting headaches after using it. He related that the headaches got worse after several days of use and the drops did not help. He had D/C and removed the prosthesis. He noted that after a couple of days the D/C resolved. He put the conformer in and OD started feeling better until he tried wearing the prosthesis again. He stated that it irritated the OD and he was now only wearing the conformer. The plan was to use the conformer until the bout of GPC resolved. Once resolved he was being sent to Mr. Tillman.

7. The claimant submitted the April 4, 2012 Medical Statement from Dr. Nguyen which indicated based upon his examination of the claimant on 3/3/11, the initial work related injury was from a thorn bush and should be authorized. Dr. Nguyen noted the claimant underwent enucleation on 2/21/11 due to blind painful eye.

8. The claimant submitted the April 4, 2012 Physical Medicine Authorization Request from Dr. Nguyen which requested 811.3, traumatic enucleation of eye; 743.00, Anophthalmos; 372.14, chronic giant papillary conjunctivitis of right eye; and V45.69 Hx of LASIK be added as compensable conditions in the claim.

9. The claimant submitted the April 4, 2012 Diagnosis Update from Dr. Nguyen which requested 364.00, acute and subacute iridocyclitis; 918.1, superficial injury of the cornea; 376.01, orbital cellulitis; and 369.8, unqualified visual loss one eye be added as compensable conditions in the claim.

10. The claimant submitted the April 4, 2012 Progress Notes from Dr. Nguyen. Dr. Nguyen noted the claimant was being seen for follow-up to Anophthalmos OD, presbyopia, GPC OD 2nd to prosthesis. The impression was traumatic enucleation of eye, anophthalmia, LASIK, Chronic giant papillary conjunctivitis of right eye, depression, and Mass.

11. The claimant submitted the May 9, 2012 through August 3, 2012 Office notes from David A. Bowman, M.D., which indicated the claimant was being seen for treatment. He related that he has had multiple courses of antibiotics and since that time had developed diarrhea, dyspepsia, frequent dull mid abdominal discomfort, and some reflux symptoms. The claimant underwent a colonoscopy but it was negative. Dr. Bowman recommended an X-ray and CT scan of the abdomen be performed.

12. The claimant submitted the May 14, 2012 Upper GI and small bowel series from Wheeling Hospital which was normal. There was no abnormal narrowing however there were masses or obstructions of the barium column seen.

13. The claimant submitted the June 28, 2012 Progress Notes from Dianne Trumbull, M.D. The diagnoses listed were traumatic enucleation of eye, Anophthalmia, Hx of LASIK, and chronic giant papillary conjunctivitis of right eye. The plan called for a referral to therapy and to begin the medication Lexapro.

14. The claimant submitted the July 24, 2012 correspondence from Brian D. McMillan, M.D., which indicated the claimant had a traumatic injury to his eye eventually resulting in the enucleation of his eye. Dr. McMillan noted it was a life changing event which impacts the claimant on a daily business. He requested approval for a psychiatric evaluation and counseling.

15. The claimant submitted the August 2, 2012 CT of the abdomen and pelvis from Wetzel County Hospital which revealed clearance of the previously seen menentery panniculitis with currently negative CT scan of the abdomen and pelvis.

16. The claimant submitted the August 20, 2012 Diagnosis Update from Dr. Nguyen. Dr. Nguyen requested Anophthalmia, depression and (Illegible) be added to the claim as compensable conditions based upon the 7/23/12 report by Dr. Trumbull.

17. The claimant submitted the October 3, 2012 report from Patricia Bailey, Ph.D. Dr. Bailey's impression was the claimant was experiencing significant symptoms of anxiety and depression as a direct result of his injury on 2/6/11 and the subsequent trauma including a serious life-threatening infection, painful medical treatment, and the enucleation of his eye. She noted his symptoms have caused significant impairment in multiple areas of functioning including cognitive, affective, behavioral, interpersonal, and occupational. Dr. Bailey stated that due to the nature and severity of his psychological condition, she would consider him to be temporarily and totally disabled which would preclude his return to work at this time. She recommended he participate in individual psychotherapy with a cognitive-behavioral approach to learn more effective ways to deal with his chronic pain, anxiety, and depression. It was noted that he may also benefit from stress management techniques such as diaphragmatic breathing, progressive muscle relaxation, and visual imagery to help him cope more effectively. A psychiatric evaluation was also recommended to determine a suitable course of psychotropic medication.

18. The claimant submitted the October 25, 2012 Attending Physician's Report by Dr. Nguyen. Dr. Nguyen noted the treatment plan included ocular prosthesis, aggressive lubrication, and spectacles. He also noted the claimant needed a primary care physician for an evaluation of his general health. The claimant was temporarily and totally disabled from 2/6/12 through 10/25/12.

19. The claimant submitted the December 27, 2012 Diagnosis Update by Dr. Bailey. Dr. Bailey noted the diagnoses Post-traumatic stress disorder and major depressive disorder – severe without psychotic features should be added to the claim per her psychological evaluation on 10/13/12.

20. The claimant submitted the January 2, 2013 Office Notes from Dr. Nguyen. Dr. Nguyen noted the claimant had anophthalmos with giant papillary conjunctivitis which was likely due to poorly fitting prosthetic. He has had multiple revisions and is still having discomfort and papillary response. He recommended a new prosthetic, trobradex, consult with Mr. Tillman for the new prosthesis and a follow-up examination with Dr. Kessen.

21. The claimant submitted his February 18, 2013 deposition wherein he testified that he returned to work on January 17, 2013 following his medical release from Dr. John Tellers. The claimant testified that he was still being treated by Dr. Nguyen for eye issues, Dr. Bowman for stomach issues, and Dr. Bailey a psychologist. He indicated that he was being treated by Dr. Tellers for problems readjusting to the monocular vision but had been previously treated by him for complex migraine headaches. He noted there were still some issues of dizziness and headaches.

22. The claimant submitted the April 25, 2013 Independent Medical Examination by Bruce Guberman, M.D. Dr. Guberman's impression was S/P right eye enucleation for infection due to a thorn; and chronic blepharitis and conjunctivitis of the right eye. He found the claimant had reached his maximum medical improvement and recommended no further treatment and/or diagnostic testing. Using the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition and West Virginia Legislated Values, Dr. Guberman calculated 33% whole person impairment (WPI) for the loss of vision in the claimant's right eye, 10% WPI for facial disfigurement from a prosthetic right eye, chronic blepharitis (eyelid inflammation) and conjunctivitis (pinkeye) which equals a total combined 40% WPI. Dr. Guberman noted that the claimant had already received 33% impairment for the injury therefore he was recommending the claimant receive an additional 7% WPI.

23. The claimant submitted the October 16, 2013 Addendum Report from Dr. Guberman. Dr. Guberman indicated he examined a report by Dr. Christopher Martin dated September 9, 2013 wherein Dr. Martin noted he agreed with Dr. Guberman's 33% impairment for the loss of vision of the right eye however he disagreed with the additional 10% based upon Section 8.5 on page 222 of the Guides. Dr. Guberman disagreed with Dr. Martin's assessment. He stated:

...in my opinion, my impairment rating is consistent with the AMA Guides, Fourth Edition, (in particular, Section 8.5 beginning on page 222), as well as the statutory 33 (thirty-three) percent impairment for loss of vision of the right eye. Therefore, I still agree entirely with the impairment rating recommended in my report combining the 33 (thirty-three) percent impairment of the whole person for loss of vision of the right eye with the 10 (ten) percent impairment of the whole person from Section 8.5 on page 222 of the Guides resulting in a total of 40 (forty) percent impairment of the whole person.

24. The employer submitted the July 1, 2011 Independent Medical Evaluation by Kevin Cox, M.D. Dr. Cox noted the compensable conditions were acute and subacute iridocyclitis, unspecified; superficial injury of the cornea; Orbital cellulitis; and unqualified visual loss of one eye. Dr. Cox opined the claimant had reached his maximum medical improvement with regards to the injury of his right eye. He further opined that the conjunctivitis precipitated by the eye prosthesis could be alleviated by medical means. Based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, the claimant was found to have 24% WPI for the total loss of vision in one eye.

25. The employer submitted the August 9, 2011 Claim Administrator's Order which granted 33% PPD based upon the medical evidence received from Kevin Cox, M.D. dated 7/1/2011.

26. The employer submitted the November 3, 2011 Addendum report from Dr. Cox which indicated the claimant was not working at the time of his evaluation. Dr. Cox opined the claimant was capable of working and he would not impose any restrictions except perhaps regarding his duties that involve a commercial driver's license or operating large heavy equipment where binocular vision would be considered a requisite. He noted the claimant's vision in his left eye is normal and therefore he should be able to drive and function normally in the capacity at which he was employed prior to the injury.

27. The employer submitted the December 12, 2012 Independent Medical Examination from Michael A. Krasnow, D.O. Dr. Krasnow opined the claimant had reached his maximum medical improvement and was prepared to go back to his normal work. He recommended the claimant have an annual exam with a retinal specialist. Dr. Krasnow reported:

This patient is status post enucleation at maximum medical improvement and by his own words neuro adapted to his monocular status. He is prepared to go back to his normal work.

28. The employer submitted the December 21, 2012 Claim Administrator's Order which granted no additional PPD based upon the Independent Medical Evaluation dated 12/11/12 by Dr. Krasnow. The claimant filed a timely protest to this Order.

29. The employer submitted the September 9, 2013 Independent Medical Evaluation by Christopher Martin, M.D. Dr. Martin noted the claimant subsequently developed conjunctivitis precipitated by the eye prosthesis. Dr. Martin found the claimant to be at his maximum medical improvement and calculated 33% for total loss of vision of the right eye per West Virginia Workers' Compensation law 23-4-6. He also noted that Dr. Guberman's findings of an additional 10% should not be considered. He stated:

It is also important further to read what the AMA Guides specifically consider to be other conditions warranting an additional 10% impairment. On page 222 this impairment may be indicated, "for such conditions as permanent deformities of the orbit, scars, and other cosmetic deformities that do not otherwise alter ocular function." Clearly, none of these are the case with Mr. Goff since he has no deformity of the orbit, no scars, and no cosmetic deformities. Dr. Guberman equates the presence of the right ocular prosthesis as a disfigurement. However, apart from a lack of conjugate gaze, the presence of Mr. Goff's prosthesis is not all apparent. The episode Mr. Goff describes of the prosthesis pointing the wrong direction occurred after he

wiped it and refers to the old prosthesis which was poorly-fitting.

...

Additional guidance is given at the beginning of this chapter in the AMA Guides on page 209. Here the AMA Guides state, "permanent deformities of the orbit, such as scars or cosmetic defects that do not alter ocular function, also may be considered to be factors causing whole person impairment as high as 10%." Again, none of these are specifically applicable to Mr. Goff.

30: The employer submitted the November 18, 2013 closing argument wherein it argued the Order of December 21, 2012 should be affirmed.

DISCUSSION:

W. Va. Code § 23-4-1g provides that, for all awards made on or after July 1, 2003, the resolution of any issue shall be based upon a weighing of all 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 shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined merely by counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

The issue is the amount of claimant's permanent partial disability. This award is for residual disability, which will remain with the claimant after his or her recovery. It is referred to as "partial" because, even though it may affect an individual's ability to work and enjoy life, the individual is not totally disabled because of it.

If a party protests the Order pertaining to an award, the parties have an opportunity to present evidence concerning the claimant's disability. Evidence of permanent partial disability in the form of testimony and reports by physicians and other experts may be submitted. The fact that a particular expert may find a certain percentage of permanent partial disability does not mean the Office of Judges is required to accept it. All reliable, probative and substantial evidence will be weighed and considered in determining if the permanent partial disability awarded is correct.

For injuries occurring after May 12, 1995, under W. Va. Code § 23-4-6 and 85 CSR 20, permanent partial disability awards are based on medical impairment. The Commission has adopted the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, as the measure of whole body medical impairment. In cases where the examination upon which the award was based was conducted on or after June 14, 2004, range of impairment limitations, as set forth in 85 CSR 20, apply to some types of injuries.

In this claim and pursuant to W.Va. Code §23-4-6(f), the claimant was granted a 33% statutory PPD award based upon the report of Dr. Cox for the total and irrevocable loss of sight of the right eye of which he had a prosthetic implant. There are four (4) reports of record that relate to the amount of PPD the claimant is entitled. The first of those is the report of Dr. Cox dated July 8, 2011, in which Dr. Cox opined that the claimant has total loss of vision of the right eye and therefore has a 24% WPI according to the Guides. The second report is that of Dr. Guberman dated April 25, 2013 in which he opined the claimant has total loss of sight of the right eye and therefore, has a 33% statutory impairment per the "West Virginia Legislated Values". The third report is that of Dr. Martin dated September 9, 2013 in which he opined the claimant has total loss of vision of the right eye and therefore, has a 33% impairment per "West Virginia Workers' Compensation law 23-4-6". The fourth report dated October 16, 2013, is again by Dr. Guberman confirming his earlier finding of 33% WPI. Thus, Dr. Guberman and Dr. Martin are in agreement regarding the 33% statutory PPD award for loss of sight of the right eye, and therefore, such grant is to be affirmed.

However, in his report of April 25, 2013, Dr. Guberman also opined the claimant has a 10% WPI for facial disfigurement from a prosthetic right eye, chronic blepharitis (eyelid inflammation) and conjunctivitis (pinkeye).¹ Despite the claimant's prosthetic eye and Dr. Cox and Dr. Martin also concluding the claimant has conjunctivitis, the claimant is not entitled to the additional 10% for facial disfigurement. W.Va. Code §23-4-6(i) states as follows:

For the purposes of this chapter, with the **exception** of those injuries provided for in subdivision (f) of this section and in section six-b [§23-4-6b] of this article, the degree of permanent disability other than permanent total disability shall be determined exclusively by the degree of whole body

¹ When combined with the 33% statutory PPD award, this 10% WPI would result in a total combined WPI of 40%. Thus, Dr. Guberman opined the claimant should be granted an additional 7% PPD award.

medical impairment that a claimant has suffered. For those injuries provided for in subdivision (f) of this section and section six-b of this article, the degree of disability shall be determined **exclusively** by the provisions of said subdivision and said section.

(Emphasis added).

The claimant's 33% statutory PPD award for loss of vision of the right eye is a total and complete grant of impairment for that eye. A grant of any additional impairment for the eye would compensate the claimant twice for the same loss. In Linville v. State Compensation Comm'r, 112 W.Va. 522, 165 S.E. 803 (1932) the claimant sustained a crush injury to his ankle. The claimant was granted a 35% PPD award which, at that time, was the maximum amount permissible under the statute for the total loss of a foot. In a later claim, the Linville claimant sustained a severe bruise on his crushed ankle. In denying additional impairment, the Court stated:

As the petitioner was paid the maximum statutory allowance for the entire loss of a foot (and the disability therefrom) as compensation for the first injury, the ruling of the commissioner must be affirmed. Otherwise, the petitioner would be compensated twice for the same loss, a sequence not contemplated by the Workmen's Compensation Law.

Thus, the additional 10% for facial disfigurement due to a prosthetic right eye, chronic blepharitis and conjunctivitis would compensate the claimant twice for the same loss.

CONCLUSIONS OF LAW:

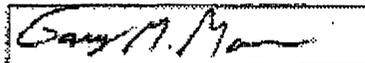
It is found that the claimant has not established by a preponderance of the evidence his entitlement to an additional PPD award for facial disfigurement.

Accordingly, it is hereby ordered that the Claim Administrator's Order dated December 21, 2012, granting the claimant no additional PPD award, be affirmed.

APPEAL RIGHTS:

Under the provisions of W.Va. Code §23-5-12, any aggrieved party may file a written appeal within thirty (30) days after receipt of any decision or action of the Administrative Law Judge. **The appeal shall be filed directly with the Workers' Compensation Board of Review at P.O. Box 2628, Charleston, WV, 25329.**

Date: February 11, 2014



Gary M. Mazezka
Administrative Law Judge

GMM:lg

cc: WV DIVISION OF NATURAL RESOURCES
TIMOTHY HUFFMAN - COUNSEL FOR EMPLOYER
KEVIN S GOFF
JONATHAN C BOWMAN - COUNSEL FOR CLAIMANT
BRICKSTREET MUTUAL