

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

September 18, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JAMES T. CANADAY, Petitioner

vs.) **No. 11-0065** (BOR Appeal No. 2044198)
(Claim No. 2007031815)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
KOKOSING-FRUCON, LLC, Respondent**

MEMORANDUM DECISION

Petitioner, James T. Canaday, by Reginald D. Henry, his attorney, appeals the Board of Review Order granting him a 6% permanent partial disability award for carpal tunnel syndrome. Kokosing-Frucon, LLC, by H. Toney Stroud, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 10, 2010, in which the Board reversed a February 16, 2010, Order of the Workers' Compensation Office of Judges, and granted a 6% permanent partial disability award. In its Order, the Office of Judges reversed the claims administrator's Order granting 4% permanent partial disability and granted Mr. Canaday a 12% permanent partial disability award. 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.

Mr. Canaday completed an application seeking a permanent partial disability award for carpal tunnel syndrome resulting from his work duties which included the use of repetitive hand movements and use of vibratory tools. On September 21, 2007, Dr. Joe O. Othman conducted an EMG study which showed significant bilateral carpal tunnel syndrome, right worse than the left side.

Dr. Robert P. Kropac evaluated Mr. Canaday on August 7, 2008, and opined Mr. Canaday suffers from a 2% impairment for each hand in accordance with West Virginia Code of State Rules § 85-20-64.5, however, Dr. Kropac did not evaluate Mr. Canaday under the

American Medical Association's, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). Dr. Bruce A. Guberman also evaluated Mr. Canaday and opined 6% impairment for each hand pursuant to West Virginia Code of State Rules § 85-20-64.5. Chiropractor H. R. Fleschner also evaluated Mr. Canaday and opined 6% impairment for each hand pursuant to West Virginia Code of State Rules § 85-20-64.5. Dr. Prasadarao B. Mukkamala also evaluated Mr. Canaday and found two non-occupational risk factors, hypothyroidism and obesity, for the development of carpal tunnel syndrome. These risk factors were felt to be significant by Dr. Mukkamala who apportioned his 6% impairment recommendation for each hand, with 3% being attributed to these risk factors. Dr. Bill Hennessey conducted a medical records review and agreed with Dr. Mukkamala's 3% impairment recommendation for each hand.

The Office of Judges considered each of the evaluating physicians' reports in determining Mr. Canaday's permanent impairment for carpal tunnel syndrome. Dr. Mukkamala's opinion, which attributed half of the impairment to non-occupational risk factors and determined "[m]erely having risk factors for the development of an occupational disease does not amount to having 'preexisting impairment'", was found unpersuasive by the Office of Judges. Dr. Hennessey's report was found unpersuasive due to his apportioning for the hypothyroidism and obesity. Dr. Kropac's report was also found unpersuasive due to his failure to estimate impairment in accordance with the American Medical Association's, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). As a result, Dr. Guberman's and Mr. Fleschner's reports finding 6% impairment for each hand was found persuasive by the Office of Judges. Thus, the Office of Judges reversed the claims administrator and granted Mr. Canaday a 12% permanent partial disability award.

On review, the Board of Review determined the Office of Judges erred in granting a 12% permanent partial disability award. "The Board finds the 12% impairment rating is excessive because [Mr. Canaday] had good results from bilateral carpal tunnel release." The Board of Review further found Dr. Mukkamala's 6% impairment rating for the compensable claim most consistent with Mr. Canaday's injury and treatment history. As a result, the Board of Review reversed the Office of Judges and granted Mr. Canaday a 6% permanent partial disability award based upon Mr. Canaday's medical history, medical records, West Virginia Code § 23-4-1g and West Virginia Code of States Rules § 85-20-1, et seq.

Mr. Canaday suffers from certain risk factors for the development of carpal tunnel syndrome, however, the medical evidence fails to establish any evidence of carpal tunnel symptoms prior to the work-related injury. While West Virginia Code § 23-4-9b provides for apportioning impairment awards for pre-existing conditions, there is no evidence establishing Mr. Canaday's carpal tunnel is a preexisting condition sufficient for this statute to apply. Therefore, pursuant to *Davies v. West Virginia Office of Ins. Comm'r*, 227 W.Va. 330, 708 S.E.2d 524 (2011), Mr. Canaday is entitled to a 6% permanent partial disability award for each affected hand. Thus, the Office of Judges Order granting 12% permanent partial disability is reinstated by this Court and the Board of Review's Order is reversed.

For the foregoing reasons, we find that the decision of the Board of Review is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of

law, and is 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. Therefore, the Court reverses the Board of Review Order and reinstates the Office of Judges Order granting Mr. Canaday a 12% permanent partial disability award for carpal tunnel syndrome.

Reversed and Remanded.

ISSUED: September 18, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin