

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 7, 2015

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

MELISSA L. COCHRAN,
Claimant Below, Petitioner

vs.) **No. 14-0150** (BOR Appeal No. 2048649)
(Claim No. 2003029810)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER**
Commissioner Below, Respondent

and

COUNCIL ON AGING, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Melissa L. Cochran, by John C. Blair, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. West Virginia Office of the Insurance commissioner, by Mary Rich Maloy, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 27, 2014, in which the Board affirmed a July 24, 2013, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's July 17, 2012, decision to grant Ms. Cochran a 5% permanent partial disability award. 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. Cochran, a home health care worker for Council on Aging, Inc., injured herself at a patient's home on December 9, 2002, as she was walking up the sidewalk. Ms. Cochran slipped on ice and fell onto her back. After regaining her bearings, she started to walk again, and fell for a second time. Ms. Cochran filed for workers' compensation benefits and the claim was held compensable for a lumbar strain. After treatment, Ms. Cochran had several independent medical evaluations. On June 15, 2005, Robert Evans, D.C., examined Ms. Cochran. Dr. Evans concluded, based upon his limited evaluation, that he could not make a recommendation about the level of permanent partial disability suffered. Dr. Evans noted that symptom magnification was present. On June 26, 2007, Mario C. Ramas, M.D., performed an independent medical evaluation of Ms. Cochran. He determined that she was at her maximum degree of medical improvement and did not suffer any disability. He noted that she did not fit any Category on Table 75 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).

On June 10, 2011, Victor Poletajev, D.C., performed an independent medical evaluation of Ms. Cochran. Per the American Medical Association's *Guides*, Dr. Poletajev placed Ms. Cochran in Lumbar Category II-C, of Table 75 of the American Medical Association's *Guides*, which resulted in 7% whole person impairment. Dr. Poletajev also found 14% whole person impairment for loss in the range of motion in the lumbar spine. Finally, he assigned 5% whole person impairment for the right L5 myotomal and sensory dermatomal deficit in the lumbar spine. In total, he recommended 24% whole person impairment for the lumbar spine. For the thoracic spine, he placed Ms. Cochran in Thoracic Category II-B, from Table 75 of the American Medical Association's *Guides*, which yielded 2% whole person impairment. Dr. Poletajev also found 3% whole person impairment based on range of motion deficits in the thoracic spine. As a result, Dr. Poletajev found 5% whole person impairment for the thoracic spine. For the cervical spine, Dr. Poletajev placed Ms. Cochran in Cervical Category B-II, of Table 75 of the American Medical Association's *Guides*, and recommended 4% whole person impairment. He also found 5% whole person impairment for loss of cervical range of motion. Dr. Poletajev then took the 34% whole person impairment and applied West Virginia Code of State Rules §§ 85-20-C, 85-20-D, and 85-20-E (2006). This resulted in 13% whole person impairment for the lumbar spine, 8% whole person impairment for the cervical spine, and 5% whole person impairment for the thoracic spine, which totaled to 24% whole person impairment for the December 9, 2002, sprain.

Michael M. Best, M.D., performed an independent medical examination on May 1, 2012. Dr. Best noted submaximal effort and pain restriction, as well as testing positive for seven out of seven of the signs of pain exaggeration. Dr. Best placed the claimant in Lumbar Category II-B, of Table 75, of the American Medical Association's *Guides*, for a total of 5% whole person impairment. Dr. Best did not find any ratable impairment related to the thoracic or cervical spine. Dr. Best then applied West Virginia Code of State Rules § 85-20-C, and recommended 5% whole person impairment related to the December 9, 2002, injury.

Michael L. Condaras, M.D., performed a record review on July 9, 2013, and was asked to give an opinion about the level of impairment suffered by Ms. Cochran. Dr. Condaras noted that Ms. Cochran has not had significant thoracic or cervical spine complaints and the MRI of the two areas did not reveal any injury. Dr. Best opined that Dr. Poletajev based his findings in the

cervical and thoracic area of the spine on Ms. Cochran's subjective and over-exaggerated explanation of her symptoms. Dr. Condaras agreed with Dr. Best that an award of 5% permanent partial disability fully compensated Ms. Cochran for her December 9, 2002, sprain. Dr. Best noted that a prior functional capacity evaluation revealed Ms. Cochran scored herself at an 82% level of disability, which is defined as exaggerated symptoms or bed bound. Dr. Best noted that she also tested positive for seven out of seven of inappropriate signs and all subjective tests show Ms. Cochran to have poor psychodynamics and strong nonorganic findings. On July 17, 2012, the claims administrator granted 5% permanent partial disability based upon the consistent reports of Dr. Best and Dr. Condaras. Ms. Cochran protested.

The Office of Judges determined that Ms. Cochran was not entitled to any more than a 5% permanent partial disability award. The Office of Judges found that Dr. Poletajev's measurement of disability was excessive and inconsistent with the evidence of record. The Office of Judges noted that Dr. Evans, Dr. Ramas, Dr. Best, and the functional capacity examination all revealed that Ms. Cochran tends to overstate her pain and disability. On her functional capacity evaluation, she rated herself as 82% disabled, she tested positive for all seven of seven inappropriate signs, and all the subjective tests show poor psychodynamics and strong nonorganic findings. The Office of Judges noted that, despite the objective MRI that did not show any problems at the thoracic and cervical level, Dr. Poletajev found impairment in both levels of the spine based upon Ms. Cochran's subjective complaints of pain. The Office of Judges also noted that no other reviewing physician found any impairment at the thoracic and cervical level. The Office of Judges noted that both Dr. Best and Dr. Condras agreed that 5% whole person impairment was all that Ms. Cochran suffered from in relation to her lumbar spine. The Office of Judges affirmed the claims administrator's decision to grant a 5% permanent partial disability award. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the findings of the Office of Judges and conclusions of the Board of Review. Dr. Poletajev's assessment was found to be unreliable compared with the other reports in the record. Dr. Poletajev's assessment that Ms. Cochran suffered impairment in the cervical and thoracic region of the spine was not consistent with the evidence of record. Dr. Poletajev was the only physician that found impairment in either the thoracic or cervical region of the spine. The other doctors in the record note that Ms. Cochran did not have significant symptoms in the thoracic and cervical region of the spine. Furthermore, the x-ray and multiple MRI's did not show any evidence of injury in the thoracic or cervical region of the spine. In relation to the lumbar area of the spine, Dr. Best and Dr. Condaras agreed that 5% permanent partial disability fully compensated Ms. Cochran for her injury. Dr. Poletajev's range of motion measurements in the lumbar area of the spine was inconsistent with the other evidence of record. Dr. Poletajev's assessment showed the least range of motion out of any evaluator. Furthermore, there was ample evidence in the record that Ms. Cochran tends to overstate her disability and her pain, which makes Dr. Poletajev's report less reliable. Dr. Best noted that during his range of motion measurements her motions were inconsistent and restricted by pain. Because the evidence established that Ms. Cochran was not entitled to any more than a 5% permanent partial disability award, the Office of Judges and Board of Review were correct in affirming the claims administrator's decision.

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: October 7, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Allen H. Loughry II