

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

LEIGH A. BALL,
Claimant Below, Petitioner

vs.) **No. 17-0189** (BOR Appeal No. 2051504)
(Claim No. 2015016298)

CHARLESTON AREA MEDICAL CENTER,
Employer Below, Respondent

FILED
November 22, 2017
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Leigh A. Ball, by Edwin H. Pancake, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Charleston Area Medical Center, by H. Dill Battle III, its attorney, filed a timely response.

The issue on appeal is the appropriate amount of a permanent partial disability award in this claim. This appeal originated from the April 23, 2015, claims administrator's decision granting a 0% permanent partial disability award. In its August 5, 2016, Order, the Workers' Compensation Office of Judges affirmed the decision. The Board of Review's Final Order dated January 23, 2017, affirmed the Order of the Office of Judges. 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.

Leigh A. Ball, a phlebotomist, injured her back and hip in the course of her employment on December 6, 2014, while she was bending over a patient to draw blood. Upon attempting to straighten, Ms. Ball felt her hip and back lock. Ms. Ball sought treatment and was diagnosed with a lumbar strain. She was to undergo physical therapy two to three times per week for four to six weeks. An MRI of the lumbar spine was performed on December 24, 2014. The impressions

were no acute findings and lumbar spondylosis with mild left exit foraminal narrowing at L3-4. On December 26, 2014, the claim was held compensable for a lumbar sprain.

Ms. Ball has a significant history of back problems dating back as early as 2008. On September 11, 2008, Ms. Ball underwent thoracic spine x-rays after complaints of back pain. The impression was old wedging at T10 and T11. Ms. Ball began to experience back pain again in September of 2012. She was diagnosed with a lumbosacral strain and underwent an MRI of the lumbar spine on October 3, 2012, which revealed a bulging disc and osteophyte formation, most notably at L5-S1 and to a lesser degree at L3-4 and L4-5. In November of 2012, Ms. Ball was further diagnosed with mild peripheral neuropathy and lumbar neuritis.

Ms. Ball underwent three independent medical evaluations to determine the extent of her permanent impairment arising from compensable injury in the instant claim. Marsha Bailey, M.D., evaluated Ms. Ball on April 2, 2015. After reviewing the medical history, Dr. Bailey opined a diagnosis of chronic low back pain without true lumbar radiculopathy that predates the compensable injury by several years. Dr. Bailey concluded that Ms. Ball had reached maximum medical improvement and that no further treatment of any kind is medically necessary to treat her compensable condition. Dr. Bailey opined that the entirety of Ms. Ball's ongoing lumbar complaints is the result of her pre-existing conditions. Referencing the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), Dr. Bailey placed Ms. Ball in Lumbar Category II B of Table 75 for 5% whole person impairment. However, after applying West Virginia Code of State Rules §85-20 (2006), Dr. Bailey determined that Ms. Ball was actually better classified under Category I and adjusted her assessment to 0% whole person impairment. Based on this report, the claims administrator granted Ms. Ball a 0% permanent partial disability award on April 23, 2015.

On July 23, 2015, Ms. Ball was evaluated by Bruce Guberman, M.D. Dr. Guberman's impression was chronic post-traumatic strain of the lumbar spine. He opined that Ms. Ball has some symptoms suggestive of lumbar radiculopathy, especially on the right side, but no objective evidence. Dr. Guberman concluded that Ms. Ball had reached maximum medical improvement and no further treatment was likely to improve her impairment in regards to this injury. Dr. Guberman assessed 8% whole person impairment. In commenting on the difference between his opinion and that of Dr. Bailey, he noted that Dr. Bailey placed Ms. Ball into Lumbar Category I for 0% impairment. In contrast, Dr. Guberman placed Ms. Ball in Lumbar Category II since she has a clinical history and examination findings compatible with a specific injury occurring at work as well as radiation of pain into her legs, which are non-verifiable radicular complaints.

On September 29, 2015, Ms. Ball testified in a deposition that she injured her back on December 6, 2014, while bending over a patient to draw blood. Prior to this injury, she was not having any problems going about her daily activities. While Ms. Ball had some low back pain in 2012, she testified that she had medication and physical therapy treatments which seemed to resolve the problem. Ms. Ball stated that Dr. Bailey found her to be at maximum medical improvement. Subsequently, Dr. Bailey testified in a deposition on December 8, 2015. Dr. Bailey stated that she reviewed the medical records and found that Ms. Ball had chronic back

pain dating back to at least 2011. She reiterated her belief that Ms. Ball had reached maximum medical improvement and diagnosed chronic low back pain without true lumbar radiculopathy. In Dr. Bailey's opinion, Ms. Ball's mechanism of injury was extremely minor and her impairment was related to her pre-existing problems. When asked whether she thought Ms. Ball's compensable injury was a new injury super-imposed on pre-existing problems, Dr. Bailey stated that if that were the case, one would expect the symptoms to improve, not worsen. Dr. Bailey stated there must be some other reason for Ms. Ball's symptoms to worsen other than a simple lumbar sprain/strain. Dr. Bailey did not attribute her continued symptoms to failed physical therapy visits. Dr. Bailey based her opinion that Ms. Ball's impairment is pre-existing on the medical records of Ms. Ball's prior treating physicians and the MRI results. Dr. Bailey stated there was no way to explain the worsening of Ms. Ball's symptoms as a result of the compensable injury.

On March 31, 2016, Ms. Ball underwent her final independent medical evaluation, which was performed by Prasadarao Mukkamala, M.D. Dr. Mukkamala opined that Ms. Ball had reached maximum medical improvement. He assessed 6% whole person impairment for the low back and lumbar spine under the American Medical Association's *Guides*. Dr. Mukkamala placed Ms. Ball in Lumbar Category II and, after applying West Virginia Code of State Rules §85-20, allocated 6% to pre-existing back problems and 0% to the compensable injury. Dr. Mukkamala stated that the work-related incident was an exacerbation of pre-existing back problems and that Ms. Ball did not have a specific injury on December 6, 2014. Dr. Mukkamala commented on Dr. Guberman's assessment and opined that he should have attributed the 8% impairment to pre-existing back problems.

On August 5, 2016, the Office of Judges affirmed the claims administrator's decision granting a 0% permanent partial disability award. The Office of Judges provided an overview of the independent medical evaluations before concluding that the findings of Dr. Bailey and Dr. Mukkamala were the most persuasive. Ms. Ball had pre-existing back problems as documented by the medical records and by Ms. Ball herself, who testified in her deposition that at the time she started working at Charleston Area Medical Center she was on minimum medication for low back pain. The Office of Judges noted that Dr. Guberman made no reference to Ms. Ball's pre-existing condition in assessing her permanent impairment. The Office of Judges referenced Dr. Bailey's deposition, stating that Dr. Bailey did not believe that the compensable injury was a new injury imposed on pre-existing conditions. Dr. Bailey stated that if this were a new injury, one would expect the symptoms to improve, not worsen as Ms. Ball's did. Dr. Bailey opined that the source of Ms. Ball's symptoms was something other than a simple lumbar sprain. The Office of Judges determined that the findings of Dr. Bailey and Dr. Mukkamala were the most persuasive and thus affirmed the 0% permanent partial disability award in accordance with their recommendations. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on January 23, 2017.

After review, we agree with the findings of fact and conclusions of law of the Office of Judges as affirmed by the Board of Review. Ms. Ball has a significant history of pre-existing conditions related to her low back. Both Dr. Bailey and Dr. Mukkamala apportioned Ms. Ball's impairment rating entirely to her pre-existing conditions. Their opinions were deemed more

reliable than that of Dr. Guberman, who failed to acknowledge any pre-existing conditions. A 0% permanent partial disability award is supported by the medical evidence of record.

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: November 22, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Elizabeth D. Walker