

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

LINDA A. WALL, Petitioner

February 15, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 101252 (BOR Appeal No. 2044243)**
(Claim No. 2008001526)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
MERCER COUNTY BOARD OF EDUCATION, Respondent**

MEMORANDUM DECISION

The Petitioner, Linda A. Wall, by Reginald D. Henry, her attorney, appeals the Board of Review Order denying her request for an award of 12% permanent partial disability based upon Dr. Bruce A. Guberman's independent medical evaluation. The Mercer County Board of Education, by its attorney, Nathaniel A. Kuratomi, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated September 1, 2010, in which the Board affirmed a March 8, 2010, order of the Workers' Compensation Office of Judges. In its order, the Office of Judges reversed the claims administrator's award of 5% permanent partial disability and granted Ms. Wall a 4% 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.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. 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 of Appellate Procedure.

The Board of Review held Ms. Wall was appropriately awarded a 4% permanent partial disability award for her left knee injury. Ms. Wall asserts the Board of Review erred in failing to properly consider the independent medical evaluation reports of Dr. Robert

Kropac and Dr. Bruce Guberman in determining the appropriate impairment for the left knee injury.

Dr. Kropac found 3% impairment to the left knee based on Table 64, page 85 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), and a 2% whole-person impairment for a 1.5 centimeter atrophy of the left thigh, 0% for the left shoulder, for a total impairment rating of 5%. (March 8, 2010, Office of Judges Order, p. 5). Dr. Guberman recommended a 3% impairment for the left knee from Table 64, page 85, 1% impairment for 1 centimeter of atrophy of the left calf, 5% impairment for 3 centimeter atrophy of the left thigh, and 3% impairment for the right shoulder for range of motion limitations, for a total recommendation of 12% impairment. *Id.* Dr. Prasadarao Mukkamala also evaluated Ms. Wall and opined Dr. Kropac and Dr. Guberman improperly considered range of motion limitations and atrophy of the left knee in contradiction with the AMA, *Guides*. *Id.* Additionally, Dr. Mukkamala found 1% impairment for range of motion limitations for the left shoulder and 3% impairment for the left knee from Table 64, page 85. *Id.*

The Office of Judges determined the *Guides*, at 84, in the “Diagnosis Based Estimates” provides the following: “The evaluating physician must determine whether diagnostic or examination criteria best describes the impairment of a specific patient. The physician, in general, should decide which estimate best describes the situation and should use only one approach for each anatomic part.” *Id.* The section specifically refers to a person with a hip fracture and a sciatic nerve injury would have estimates for both hip impairment and nerve palsy as an example of when the use of diagnostic and examination criteria is appropriate. *Id.* Based upon its reading of this section, the Office of Judges held the specifically listed injury is not in play in this appeal, and neither Dr. Kropac nor Dr. Guberman provide a rationale for using more than one impairment method for the same anatomic part. *Id.* Dr. Mukkamala’s report was given greater evidentiary weight in the Office of Judge’s conclusion that Ms. Wall is only entitled to a 4% permanent partial disability award, 1% for the left shoulder and 3% for the left knee. *Id.* The Board of Review also reached this same reasoned conclusion and affirmed the Office of Judges Order in its Order of September 1, 2010.

According to the *Guides*, generally an evaluating physician must determine whether the diagnostic or examination criteria best describes the impairment of the specific patient. *Guides*, p. 84. However, the *Guides* also provides there may be instances in which elements from both diagnostic and examination approaches will apply to a specific situation. *Id.* Both Dr. Kropac and Dr. Guberman found utilizing the diagnostic and examination criteria appropriate in evaluating Ms. Wall’s impairment. The Office of Judges found this assessment inappropriate and discounted the opinions contained in these reports in favor of Dr. Mukkamala’s report. Under the preponderance of the evidence standard, Ms. Wall was appropriately awarded a 5% permanent partial disability award by the claims administrator.

For the foregoing reasons, we find that the decision of the Board of Review is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the Court reverses the Board of Review order granting 4% permanent partial disability and reinstates the claims administrator's order granting 5% permanent partial disability.

Reversed.

ISSUED: February 15, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Justice Robin J. Davis

Justice Brent D. Benjamin