

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

HEATHER D. BOLEY, Petitioner

April 24, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101528 (BOR Appeal No. 2044513)
(Claim No. 2008041864)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WEIRTON MEDICAL CENTER, INC., Respondent**

MEMORANDUM DECISION

Petitioner, Heather D. Boley, by Raymond A. Hinerman, her attorney, appeals the Board of Review order granting her a 5% permanent partial disability award for her lumbar spine injury. Weirton Medical Center, Inc., by Peter R. Rich, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated November 10, 2010, in which the Board reversed an April 23, 2010, Order of the Workers' Compensation Office of Judges granting Ms. Boley a 10% permanent partial disability award. In its Order, the Office of Judges reversed the claims administrator's Order granting Ms. Boley a 5% 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.

Ms. Boley asserts the Office of Judges properly found the preponderance of the evidence supports a finding that she suffers from lumbar spine radicular complaints sufficient for a 10% permanent partial disability award. This assertion of radiculopathy is supported both, by Ms. Boley's subjective radicular complaints, and the objective opinions of Dr. Carol A. Korzi and Dr. Thomas J. Schmitt. On the other hand, Weirton Medical Center asserts the objective medical tests, EMG studies, CT scan, MRI, and whole body scan, along with the opinions of Dr. Victoria Langa and Dr. Sushil M. Sethi fail to establish radiculopathy. Dr. Korzi, Dr. Schmitt, Dr. Langa, and Dr. Sethi did not find any evidence of radiculopathy during their evaluations.

The Office of Judges reviewed the independent medical reports and opined both Dr. Korzi and Dr. Schmitt found evidence of radiculopathy, while Dr. Langa and Dr. Sethi found no evidence of radiculopathy. Additionally, the Office of Judges held Dr. Korzi did not make an impairment rating pursuant to West Virginia Code of State Rules § 85-20-1, et seq., and Dr. Schmitt recommended 10% impairment pursuant to the Rule. As a result, the Office of Judges held when weighing the opposing evidence there is an equal amount of evidentiary weight for each side and granted Ms. Boley a 10% permanent partial disability award.

On Review the Office of Judges order, the Board of Review found the preponderance of the evidence does not support a finding that Ms. Boley suffers from radiculopathy and found the 10% permanent partial disability award was granted in error. The numerous diagnostic testing results showed no evidence of radiculopathy. In addition, Ms. Boley's injury does not correlate with Category III requirements regarding radiculopathy, surgery, or fractures. The Board of Review further found Dr. Schmitt was the only physician to place Ms. Boley into West Virginia Code of State Rules § 85-20-C, Category III. Dr. Langa, Dr. Short, and Dr. Sethi all placed Ms. Boley into Category II. Therefore, the Board of Review held Ms. Boley was entitled to the previously granted 5% permanent partial disability award and reversed the Office of Judges order granting a 10% permanent partial disability award.

Ms. Boley asserts she suffers from radicular complaints as set forth in Dr. Korzi and Dr. Schmitt's records. Thus, Ms. Boley asserts the record supports the Office of Judges Order granting a 10% permanent partial disability award. On the other hand, Dr. Langa, Dr. Short, and Dr. Sethi all failed to find any evidence of radiculopathy. West Virginia Code § 23-4-1g(a) provides that if after weighing all the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight favors conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted. The Court holds that review of the medical evidence in this claim equally preponderates in favor of Ms. Boley. Therefore, pursuant to West Virginia Code § 23-4-1g(a), Ms. Boley is entitled to the 10% permanent partial disability award granted by the Office of Judges.

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 upon 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 Ms. Boley a 10% permanent partial disability award for her compensable injuries.

Reversed.

ISSUED: **April 24, 2012**

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin

Justice Margaret L. Workman

DISSENTED IN BY:

Justice Robin J. Davis

Justice Thomas E. McHugh