

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

CARLOS C. O'NEAL, Petitioner

vs.) **No. 101551 (BOR Appeal No. 2044381)**
(Claim No. 980018942)

FILED

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

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ESSENTIAL FUELS, INC., Respondent**

MEMORANDUM DECISION

Petitioner, Carlos C. O'Neal, by John C. Blair, appeals the Board of Review Order affirming the grant of an 8% permanent partial disability award following a work-related cervical spine injury. The West Virginia Office of Insurance Commissioner, by Jack M. Rife, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated November 8, 2010, in which the Board affirmed a March 12, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's March 23, 2009, Order, which found Mr. O'Neal fully compensated by his prior 5% permanent partial disability award. The Office of Judges granted Mr. O'Neal an additional 3% permanent partial disability award for a total of 8% permanent partial disability for Mr. O'Neal's cervical spine. 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 parties' submissions 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 Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the Office of Judges' Order, which granted Mr. O'Neal a total 8% permanent partial disability award. Mr. O'Neal, however, contends he is entitled to an additional 7% permanent partial disability award based upon the report of chiropractor Victor Poletajev. Mr. O'Neal states that Dr. Poletajev's report was ignored simply because Dr. Poletajev found greater permanent impairment than Dr. Paul Bachwitt, whose report served as the basis for Mr. O'Neal's 8% permanent partial disability award.

Mr. O'Neal also states that Dr. Bachwitt's report is unreliable because Dr. Bachwitt apportioned half of the found impairment to preexisting degenerative changes. Mr. O'Neal contends that no evidence exists establishing that he suffered from any degenerative changes prior to the subject compensable injury. Further, Mr. O'Neal argues that, if any apportionment should have been made, it should have been made following Dr. Bachwitt's range of motion calculations. Dr. Bachwitt, however, made the apportionment following application of Rule 20.

The Office of Judges, on the other hand, noted that Dr. Bachwitt's examination was performed most recently in time. Therefore, increased impairment found by Dr. Poletajev was not permanent in nature. Indeed, Dr. Poletajev noted symptoms of radiculopathy that were not present during Dr. Bachwitt's examination of Mr. O'Neal. Accordingly, the Office of Judges found Dr. Bachwitt's impairment rating more reliable than Dr. Poletajev's.

Moreover, any concerns with respect to Dr. Bachwitt's apportionment of Mr. O'Neal's impairment to preexisting degenerative changes are alleviated by the Office of Judge's disregard for that apportionment. Specifically, because Dr. Bachwitt failed to provide any explanation for apportioning half of Mr. O'Neal's impairment, the Office of Judges granted Mr. O'Neal a permanent partial disability award utilizing the full amount of impairment found by Dr. Bachwitt. The Board of Review reached the same reasoned conclusion in its November 8, 2010, Order.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it 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 grant of an 8% permanent partial disability award is affirmed.

Affirmed.

ISSUED: June 18, 2012

CONCURRED IN BY:

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum