

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**MELISSA KIMBLE,
Claimant Below, Petitioner**

FILED
June 11, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-1685 (BOR Appeal No. 2046018)
(Claim No. 2009074409)

**UCB,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Melissa Kimble, by Edwin H. Pancake, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. UCB, by Lisa W. Hunter, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated November 17, 2011, in which the Board affirmed a May 11, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's November 10, 2009, decision granting an 8% permanent partial disability award for the lumbar spine. 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. Kimble worked as a pharmaceutical sales representative for UCB when she was injured in a motor vehicle accident. The claim was held compensable for lumbar and cervical sprain/strain. Paul Bachwitt, M.D., and Prasadarao B. Mukkamala, M.D., concluded that Ms. Kimble has been fully compensated for her cervical spine by her prior 10% permanent partial disability award granted on May 11, 1999, and recommended no additional impairment for the cervical spine. On June 15, 2010, Bruce Guberman, M.D., recommended a 5% permanent partial disability award for the cervical spine. The claims administrator granted Ms. Kimble an 8% permanent partial disability award for the lumbar spine and a 0% permanent partial disability award for the cervical spine.

The Office of Judges affirmed the claims administrator's decision granting Ms. Kimble an 8% permanent partial disability award for the lumbar spine and a 0% permanent partial disability award for her cervical spine. On appeal, Ms. Kimble disagrees and asserts that Dr. Guberman's recommendation of a 5% permanent partial disability award for the cervical spine should be granted because even though she underwent a prior neck surgery her impairment for the instant injury should not go uncompensated. Ms. Kimble did not appeal the lumbar spine award. UCB maintains that Ms. Kimble failed to submit medical evidence that she has more than a 10% impairment of her cervical spine and thus, has been fully compensated by her prior 10% permanent partial disability award for the cervical spine that was awarded by the claims administrator's decision dated May 11, 1999.

The Office of Judges concluded that Ms. Kimble has been fully compensated by her prior 10% permanent partial disability award for her earlier compensable cervical spine injury. Dr. Bachwitt and Dr. Mukkamala applied the range of motion model and then West Virginia Code of State Rules § 85-20 (2006). Both doctors opined that Ms. Kimble's has an 8% impairment for her cervical spine. Dr. Bachwitt and Dr. Mukkamala also concluded that Ms. Kimble has been fully compensated for her cervical spine by her prior award of 10%. The Office of Judges relied on Dr. Bachwitt's and Dr. Mukkamala's conclusions that the prior 10% permanent partial disability award should be deducted after utilizing West Virginia Code of State Rules § 85-20, and determined Ms. Kimble was fully compensated for the cervical spine because her 8% impairment is less than her prior 10% permanent partial disability award. The Office of Judges agreed with Dr. Mukkamala that Dr. Guberman erroneously calculated Ms. Kimble's impairment. The Office of Judges discredited Dr. Guberman's conclusion because he improperly apportioned the prior 10% permanent partial disability award. The Board of Review reached the same reasoned conclusions in its decision of November 17, 2011. We agree with the reasoning and conclusions of the Board of Review.

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: June 11, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II