

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

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

CONNIE J. PRUITT,
Claimant Below, Petitioner

vs.) **No. 12-0500** (BOR Appeal No. 2046536)
(Claim No. 2009090827)

MCDOWELL COUNTY BOARD OF EDUCATION,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Connie J. Pruitt, by Gregory S. Prudich, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. McDowell County Board of Education, by T. Jonathan Cook, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 23, 2012, in which the Board affirmed an October 25, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's December 16, 2009, decision granting Ms. Pruitt an 8% permanent partial disability award. The Office of Judges granted Ms. Pruitt a 5% permanent partial disability award. 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. Pruitt worked as a cook for the McDowell County Board of Education. On March 16, 2009, Ms. Pruitt injured her lower back while lifting boxes of food. Her claim was held compensable for a lumbar strain. Following initial treatment, Dr. Nadar evaluated Ms. Pruitt and found that Ms. Pruitt had reached the maximum degree of medical improvement. He then recommended that Ms. Pruitt receive an 8% permanent partial disability award based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed.

1993). On December 16, 2009, the claims administrator granted Ms. Pruitt an 8% permanent partial disability award based on Dr. Nadar's recommendation. Following this decision, Dr. Guberman evaluated Ms. Pruitt. Dr. Guberman found that a lumbar laminectomy was a necessary and appropriate treatment in Ms. Pruitt's case. But Dr. Guberman found that if the surgery was not authorized then Ms. Pruitt was at the maximum degree of medical improvement. Dr. Guberman then recommended a 13% permanent partial disability award based on the American Medical Association's *Guides* and West Virginia Code of State Rules § 85-20-C (2006). Following Dr. Guberman's assessment, Ms. Pruitt underwent lumbar surgery. Dr. Bachwitt then evaluated Ms. Pruitt and found that she had reached the maximum degree of medical improvement. Dr. Bachwitt then recommended a 5% permanent partial disability award based on the American Medical Association's *Guides*. Dr. Bachwitt stated in his report that Dr. Guberman's impairment rating was partially based on a finding of radiculopathy which was no longer present following the surgery. On October 25, 2011, the Office of Judges reversed the claims administrator's decision and granted Ms. Pruitt a 5% permanent partial disability award. The Board of Review then affirmed the Order of the Office of Judges on March 23, 2012, leading Ms. Pruitt to appeal.

The Office of Judges concluded that Ms. Pruitt suffered 5% impairment as a result of her March 16, 2009, lumbar spine injury. The Office of Judges concluded that the claims administrator's grant of an 8% permanent partial disability award was an overpayment. In making this determination, the Office of Judges relied on the recommendation of Dr. Bachwitt. The Office of Judges found that Dr. Bachwitt's report was the most persuasive and reliable evaluation on the record because it occurred after Ms. Pruitt had undergone lumbar surgery. The Office of Judges found that the recommendation of Dr. Nadar was reliable at the time it was made. The Office of Judges then found that the recommendation of Dr. Guberman was not reliable because it was issued before Ms. Pruitt had reached the maximum degree of medical improvement. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Ms. Pruitt has not shown that she is entitled to a greater than 5% permanent partial disability award for her lumbar strain. Although the record contains three impairment assessments, only Dr. Bachwitt's evaluation occurred after Ms. Pruitt underwent lumbar surgery. Dr. Bachwitt properly evaluated Ms. Pruitt under the American Medical Association's *Guides* and fit her whole person impairment rating within West Virginia Code of State Rules § 85-20-C. The Office of Judges was within its discretion in relying on Dr. Bachwitt's assessment. Dr. Nadar's and Dr. Guberman's impairment evaluations both occurred prior to Ms. Pruitt's surgery and the Office of Judges was within its discretion in not relying on either report.

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: January 14, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II

Justice Brent D. Benjamin, not participating