

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

January 14, 2014

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

**FRANK SERMO,  
Claimant Below, Petitioner**

vs.) **No. 12-0505** (BOR Appeal No. 2046441)  
(Claim No. 2004011220)

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER  
Commissioner Below, Respondent**

**and**

**FAIRMONT STATE COLLEGE - BOR,  
Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Frank Sermo, by Robert L. Stultz, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Anna L. Faulkner, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 22, 2012, in which the Board affirmed a September 14, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 31, 2010, decision which corrected a prior May 14, 2009, decision to reflect an additional 1% permanent partial disability award for a total of 21% permanent partial disability. 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.

Mr. Sermo worked for Fairmont State College as a stock person for the food service department. On August 26, 2003, while Mr. Sermo was putting away stock he bumped his left wrist and hand on the corner of a metal cart causing nerve compression of the left wrist. Mr. Sermo's claim was held compensable and, after a course of treatment including surgery, Dr. Koay found that Mr. Sermo had 14% whole person impairment. The claims administrator granted Mr. Sermo an award based on Dr. Koay's report. Following this award, Mr. Sermo underwent a second surgery and Dr. Koay re-evaluated his impairment. Dr. Koay found that Mr. Sermo had 19% whole person impairment related to his nerve motor deficit, sensory loss, and loss of range of motion. He then combined this with 2% whole person impairment for atrophy of the left forearm for a total of 21% whole person impairment. The claims administrator granted Mr. Sermo an additional 7% permanent partial disability award on May 14, 2009, based on Dr. Koay's increased whole person impairment rating. Mr. Sermo was then evaluated by Dr. Milan, who found 27% whole person impairment for loss of grip strength and loss of range of motion. She then found 13% impairment for ulnar nerve neuropathy, which she combined for a 38% whole person impairment rating. Dr. Gerbo then evaluated Mr. Sermo and found that he had not reached the maximum degree of medical improvement. Dr. Gerbo recommended that Mr. Sermo have a follow-up appointment with his surgeon. Following this assessment, on August 31, 2010, the claims administrator issued a decision correcting its May 14, 2009, decision. The claims administrator stated that Mr. Sermo had already received a 20% permanent partial disability award. The claims administrator amended its previous decision stating that Mr. Sermo should have only received a 1% permanent partial disability award and had received a 6% overpayment. On September 14, 2011, the Office of Judges affirmed the claims administrator's August 31, 2010, decision. The Board of Review then affirmed the Order of the Office of Judges on March 22, 2012.

The Office of Judges concluded that Mr. Sermo has a total of 21% whole person impairment related to his injury. The Office of Judges then concluded that this represented an additional 1% permanent partial disability award above what the claims administrator had previously granted him. The Office of Judges found that Dr. Koay arrived at his 21% rating of Mr. Sermo's impairment exactly as directed by the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). The Office of Judges found that Dr. Milan's 38% impairment recommendation was less credible and reliable because she did not properly calculate Mr. Sermo's impairment by first combining all upper extremity impairments before converting them to whole person impairment. The Office of Judges also found that Dr. Milan considered Mr. Sermo's loss of grip strength as a significant amount of his impairment without adequate justification. The Office of Judges found that loss of grip strength should only be considered a significant factor in rare cases and that Dr. Milan did not sufficiently establish that Mr. Sermo's impairment was a rare case. Finally, the Office of Judges found that Dr. Gerbo's report was an outlier since it had been nearly three years since Mr. Sermo's last surgery. 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. Mr. Sermo has not demonstrated that he is entitled to a greater than 21% permanent partial disability award in relation to his August 26, 2003, injury. The only evidence in the record

that supports Mr. Sermo's position is the report of Dr. Milan. The Office of Judges, however, found several problems with Dr. Milan's impairment evaluation and was justified in not relying on her report. The Office of Judges was also within its discretion in not relying on the report of Dr. Gerbo because his findings were not supported by the record as a whole.

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 Menis E. Ketchum  
Justice Allen H. Loughry II

**DISSENTING:**

Justice Margaret L. Workman

Justice Brent D. Benjamin, not participating