

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

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

KATHY P. BLANKENSHIP,
Claimant Below, Petitioner

vs.) **No. 12-0756** (BOR Appeal No. 2046639)
(Claim No. 2009069426)

CLIFFS NORTH AMERICAN COAL, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Kathy P. Blankenship, by John C. Blair, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Cliffs North American Coal, LLC, by Sean Harter, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 30, 2012, in which the Board affirmed a November 14, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's June 24, 2010, decision granting Ms. Blankenship an 8% 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. Blankenship worked as a mechanic for Cliffs North American Coal, LLC when she suffered an injury to her lower back while lifting a cover on a jeep on November 15, 2008. The claim was held compensable for a low back injury. Dr. Mukkamala and Dr. Condaras rated Ms. Blankenship with an 8% whole person impairment for the lumbar spine injury. Dr. Poletajev rated Ms. Blankenship with a 13% whole person impairment for the lumbar spine. The claims administrator granted Ms. Blankenship an 8% permanent partial disability award.

The Office of Judges affirmed the claims administrator's decision and held that Ms. Blankenship is entitled to an 8% permanent partial disability award. On appeal, Ms. Blankenship disagrees and asserts that the Office of Judges erred in giving less evidentiary weight to the report of Dr. Poletajev. She further asserts that the Office of Judges erred in justifying Dr. Mukkamala's and Dr. Condaras's conclusions to not rate her under Table 75 from the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, (4th ed. 1993) due to her preexisting degenerative changes because this is not a legitimate reason to exclude a rating from Table 75. Cliffs North American Coal, LLC maintains that Dr. Poletajev's 13% whole person impairment rating is unreliable because Dr. Poletajev failed to consider Ms. Blankenship's preexisting back condition.

The Office of Judges concluded that Dr. Mukkamala's and Dr. Condaras's reasons for not rating Ms. Blankenship are justified under Table 75 of the American Medical Association's *Guides*. Dr. Mukkamala and Dr. Condaras did not rate Ms. Blankenship under Table 75 of the American Medical Association's *Guides* because of her preexisting degenerative changes. The Office of Judges found that Ms. Blankenship's preexisting degenerative changes are clearly demonstrated by the fact that the degenerative changes revealed on the December 14, 2008, MRI are the same degenerative changes revealed on an MRI study of 2005.

The Office of Judges concluded that Ms. Blankenship's argument that Dr. Condaras and Dr. Mukkamala did not apportion for preexisting conditions is not persuasive. The Office of Judges determined that Dr. Mukkamala and Dr. Condaras both did take into account Ms. Blankenship's preexisting degenerative changes. The Office of Judges found Dr. Poletajev's failure to consider Ms. Blankenship's preexisting conditions and history of low back to be significant in weighing the evidence of record. The Office of Judges held that the preponderance of the evidence fails to demonstrate that Ms. Blankenship is entitled to greater than 8% permanent partial disability award and granted Ms. Blankenship an 8% permanent partial disability award. The Board of Review reached the same reasoned conclusions in its decision of May 30, 2012. 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: 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