

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 12, 2016

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

LLOYD E. HARRELL JR.,
Claimant Below, Petitioner

vs.) **No. 15-0512** (BOR Appeal No. 2050045)
(Claim No. 2008015061)

RIVERENA CONSTRUCTION, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Lloyd E. Harrell Jr., by Reginald D. Henry and Rodney A. Skeens, his attorneys, appeals the decision of the West Virginia Workers' Compensation Board of Review. Riverena Construction, LLC, by Bradley A. Crouser, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 30, 2015, in which the Board affirmed a December 4, 2014, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 2, 2013, decision granting Mr. Harrell a 3% permanent partial disability award above the prior 4% award granted for his left elbow and shoulder injury. 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. Harrell worked as a construction foreman for Riverena Construction, LLC. On July 6, 2007, Mr. Harrell injured his left elbow and shoulder when he tripped and fell at work. Mr. Harrell filed an application for workers' compensation benefits, and his claim was held compensable for a sprain of the left elbow and sprain of the left shoulder.

Nearly a year later following a course of conservative treatment which included physical therapy and injections, Saghir Mir, M.D., performed an independent medical evaluation of Mr. Harrell. He found that Mr. Harrell had mild restrictions of his mobility in the left shoulder as well as a slight restriction of flexion of the left elbow. Dr. Mir found that Mr. Harrell had reached his maximum degree of medical improvement. He calculated that Mr. Harrell had 2% impairment for loss of range of motion in the left shoulder and 2% impairment for loss of range of motion in the left elbow under the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). On June 9, 2008, the claims administrator granted Mr. Harrell a 4% permanent partial disability award based on Dr. Mir's evaluation.

Several years later, on June 5, 2013, Bruce A. Guberman, M.D., performed a new independent medical evaluation at Mr. Harrell's request. He found that Mr. Harrell had new complaints of pain and stiffness in his shoulder due to a progression of his compensable injury. Dr. Guberman determined that Mr. Harrell had 7% whole person impairment for loss of range of motion in his left elbow and shoulder under the American Medical Association's *Guides*. Following Dr. Guberman's evaluation, Mr. Harrell submitted an application that his claim be reopened for an additional permanent partial disability award. The claims administrator granted Mr. Harrell's request and scheduled him for a second evaluation with Dr. Mir.

In his evaluation, Dr. Mir disagreed with Dr. Guberman's findings. He found that Mr. Harrell had complaints of pain and restriction of mobility in his left shoulder; but he found that Mr. Harrell's left elbow symptoms had completely resolved. Under the American Medical Association's *Guides*, Dr. Mir found that Mr. Harrell had 2% impairment of the left elbow and was fully compensated by the prior award. However, he calculated that Mr. Harrell had decreased range of motion in his left shoulder and now had 4% impairment related to his left shoulder sprain. Because he had previously received a 2% award for his left shoulder, Dr. Mir found that Mr. Harrell was entitled to an additional 2% permanent partial disability award.

On October 2, 2013, the claims administrator granted Mr. Harrell an additional 3% permanent partial disability award based on Dr. Guberman's evaluation. Mr. Harrell, however, protested this decision and requested a second evaluation from Robert B. Walker, M.D. Dr. Walker found that Mr. Harrell had more significant loss of range of motion in his left shoulder than determined by the prior evaluators. Dr. Walker calculated that Mr. Harrell had 11% whole person impairment for his left shoulder and left elbow injury under the American Medical Association's *Guides*, which would entitle him to an additional 7% permanent partial disability award. The next month, Michael R. Condaras, D.C., also evaluated Mr. Harrell. He agreed with Dr. Guberman's calculation of Mr. Harrell's impairment. Dr. Condaras found that Mr. Harrell had 7% whole person impairment for loss of range of motion of the left shoulder and left elbow under the American Medical Association's *Guides*. Considering that he had previously received a 4% award for his left shoulder and left elbow, Dr. Condaras found that Mr. Harrell was fully compensated for his compensable injuries by the additional 3% permanent partial disability award. Dr. Condaras also found that Dr. Walker's assessment of Mr. Harrell's impairment was excessive. On December 4, 2014, the Office of Judges affirmed the claims administrator's October 2, 2013, decision. The Board of Review affirmed the Order of the Office of Judges on April 30, 2015, leading Mr. Harrell to appeal.

The Office of Judges concluded that Mr. Harrell failed to show that he was entitled to more than a 3% permanent partial disability award above the 4% award he was previously granted for his compensable injury. The Office of Judges based its conclusion on the evaluations of Dr. Guberman and Dr. Condaras. It determined that these evaluators provided the most reliable calculation of Mr. Harrell's current left shoulder and left elbow impairment. The Office of Judges also considered the evaluation of Dr. Walker, but it did not adopt his impairment recommendation. The Office of Judges found that Dr. Walker's range of motion testing was not consistent with the testing performed by the remaining evaluators in the record. It also found that Dr. Walker's testing was not consistent with the weight of the evidence. 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. Harrell has not demonstrated that he is entitled to any additional permanent partial disability beyond the 3% award granted by the claims administrator. The evaluations of Dr. Guberman and Dr. Condaras demonstrate that Mr. Harrell has 7% whole person impairment related to his left shoulder and left elbow injury. Because he was previously granted a 4% permanent partial disability award, the additional 3% award fully compensates him for the impairment related to his injury. Both Dr. Guberman and Dr. Condaras performed a thorough evaluation of Mr. Harrell's loss of range of motion and their calculations were consistent with the directives of the American Medical Association's *Guides*. The reasons the Office of Judges provided for relying on Dr. Guberman's and Dr. Condaras's impairment recommendations instead of the rating calculated by Dr. Walker were sufficient. The Office of Judges was within its discretion in determining Mr. Harrell's permanent partial disability award based on Dr. Guberman's and Dr. Condaras's evaluations.

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: April 12, 2016

CONCURRED IN BY:

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