

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JAMES F. COEN, Petitioner

vs.) No. 101133 (BOR Appeal No. 2044010)
(Claim No. 2002006589)

FILED

October 26, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER, and
FLEXIBLE STEEL LACING COMPANY,
Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated August 9, 2010, in which the Board affirmed a December 21, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 1, 2008, Order, which granted Mr. Coen a 20% permanent partial disability award. The appeal was timely filed by the petitioner, and the West Virginia Office of Insurance Commissioner filed a response. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the parties' submissions and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the Office of Judge's Order, which granted Mr. Coen a 20% permanent partial disability award. Mr. Coen argues that he is entitled to a 30% permanent partial disability award, as found by Dr. James Dauphin. Mr. Coen states that the primary difference between Dr. Dauphin's report and the report of Dr. Bruce A. Guberman, which found 20% whole person impairment, is the pain category ascribed by each evaluator. Dr. Dauphin rated Mr. Coen's pain as "severe," while Dr. Guberman characterized it as

“moderate.” During Mr. Coen’s deposition, he testified that his pain is severe. Thus, Mr. Coen argues that Dr. Dauphin’s report should serve as the basis for his permanent disability award.

The Office of Judges noted first that Dr. Dauphin applied Section f of Table 66 of the *AMA Guides* incorrectly, which led to an inflated impairment rating. (Dec. 21, 2009, Office of Judges Order, p. 4.) Namely, Dr. Dauphin subtracted 15 points for a 5 degree knee misalignment. *Id.* The *Guides* state, however, that three points are to be deducted for each of five through ten degrees of misalignment. In other words, three points are to be deducted for five degrees of misalignment, six points for six degrees of misalignment, and so forth. Dr. Dauphin multiplied the three points by the five degrees of impairment. For this reason, the Office of Judges found Dr. Dauphin’s report to be less credible.

Moreover, a third report provided by Dr. ChuanFang Jin also found 20% whole person impairment. The miscalculation in Dr. Dauphin’s report combined with the “substantial agreement” of Dr. Guberman and Dr. Jin caused the Office of Judges to accord more weight to Dr. Guberman’s and Dr. Jin’s reports. Thus, the Office of Judges affirmed the grant of a 20% permanent partial disability award. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its August 9, 2010, decision.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board’s material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the grant of a 20% permanent partial disability award is affirmed.

Affirmed.

ISSUED: October 26, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh