

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

RITA JO VANCE, Petitioner

November 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101242 (BOR Appeal No. 2044306)
(Claim No. 2008036052)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
DIGNITY HOSPICE OF SOUTHERN WV, INC.,
Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated September 2, 2010, in which the Board affirmed a March 9, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 31, 2008, decision to grant Ms. Vance a 13% permanent partial disability award. The appeal was timely filed by the petitioner and a response was filed by the Employer. 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 petition 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.

In its Order, the Office of Judges held that Ms. Vance failed to prove by a preponderance of the evidence that she is entitled to an additional permanent partial disability award. Ms. Vance disputes this finding and asserts that the Office of Judges failed to apply the preponderance of the evidence standard in rendering its decision to reject the opinion of

Dr. Guberman, and affirm Ms. Vance's 13% permanent partial disability award based on the opinions of Drs. Mukkamala and Scott.

W. Va. Code § 23-4-1g(a) provides that "For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted."

In applying this standard, the Office of Judges found that all three physicians measured Ms. Vance's range of motion when calculating her degree of thoracic spine impairment. Dr. Scott's and Dr. Mukkamala's measurements for right rotation were within 3° of each other; Dr. Guberman's measurement was 10° less than Dr. Scott's and 13° less than Dr. Mukkamala's. Dr. Scott's and Dr. Mukkamala's measurements for left rotation were within 2° of each other; Dr. Guberman's was 12° less than Dr. Scott's and 14° less than Dr. Mukkamala's. The Office of Judges found Dr. Guberman's measurements to be uncorroborated by those of Drs. Scott and Mukkamala, and further found that there was nothing in the record to support Dr. Guberman's findings.

The Office of Judges also found that when calculating Ms. Vance's degree of lumbar spine impairment, Dr. Guberman found that she exhibited symptoms of lumbar radiculopathy, sensory abnormalities in the lower extremity in the S1 nerve distribution, and the absence of deep tendon reflexes. Dr. Mukkamala was unable to substantiate this finding, and Dr. Scott found that Ms. Vance's sensory response in pinprick was normal, and that her tendon reflexes were normal as well. Again, the Office of Judges found no basis in the record to support Dr. Guberman's findings. The Board of Review reached the same reasoned conclusion in its decision of September 2, 2010.

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 is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: November 15, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh