

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JERRY S. BROWN, Petitioner

vs.) No. 101418 (BOR Appeal No. 2044445)
(Claim No. 20020424386)

FILED

December 7, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
JAN CARE AMBULANCE OF FAYETTE CO., INC.,
Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated October 13, 2010, in which the Board affirmed an April 13, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 7, 2009, Order, which granted Mr. Brown a 5% permanent partial disability award for the thoracic spine injury component of his compensable injury. The claims administrator also held that Mr. Brown had been fully compensated for the right shoulder component of his compensable injury by virtue of a prior 19% 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. Brown a 5% permanent partial disability award for his thoracic spine and held that Mr. Brown had been fully compensated by a prior 19% permanent partial disability award for his right

shoulder. Mr. Brown argues that he is entitled to an additional 3% permanent partial disability award for his thoracic spine injury based upon Dr. Joseph Snead's findings. Although Mr. Brown acknowledges that Dr. Snead "failed to correlate . . . his 9% thoracic range of motion recommendation with applicable Table § 85-20-D," Mr. Brown argues that "a review of Table § 85-20-D will reveal that the claimant falls under Thoracic Category II which would support an 8% permanent partial disability award."

The Office of Judges first noted that West Virginia Code R. § 85-20-64.1 directs that, "once an impairment level has been determined by range of motion assessment, that level will be compared with the ranges set forth below" and reduced or increased to fall within the prescribed range. (Apr. 13, 2010, Office of Judges Order, p. 5.) Dr. Saghir Mir was the only evaluating physician to do this. *Id.* Dr. Snead, on the other hand, "failed to correlate . . . his 9% thoracic range of motion recommendation with applicable Table § 85-20-D[.]" *Id.* Thus, Dr. Snead's findings "fail[] to reflect compliance with Table § 85-20D[, and his evaluation] cannot be afforded any determinative evidentiary weight." *Id.* Accordingly, the Office of Judges granted Mr. Brown a 5% permanent partial disability award based upon Dr. Mir's findings, which were considered to be the most reliable. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its October 13, 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 5% permanent partial disability award for Mr. Brown's thoracic spine injury and the holding that Mr. Brown has been fully compensated for the right shoulder component of his injury are affirmed.

Affirmed.

ISSUED: December 7, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Menis E. Ketchum

Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin