

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 6, 2012

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

DAVID L. FOUCH, Petitioner

**vs.) No. 11-0039 (BOR Appeal No. 2044708)
(Claim No. 2008035907)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
SPARTAN MINING COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner David L. Fouch, by John Blair, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order granting a 15% permanent partial disability award. Spartan Mining Company, by Sean Harter, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 15, 2010, in which the Board affirmed a June 11, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's March 10, 2009, Order granting the petitioner an 11% permanent partial disability award. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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 this case, Mr. Fouch was working for Spartan Mining Company when he was injured during a heavy rock fall. The claim was subsequently held compensable for a lumbar strain, chest wall contusion, abrasion of the hand and trunk, cervical strain, patella chondromalacia, and bursitis or tendonitis. On March 10, 2009, the claims administrator awarded Mr. Fouch an 11% permanent partial disability award for his compensable injuries.

Four independent medical evaluations were performed to evaluate Mr. Fouch's permanent impairment. Dr. Grady's assessment addressed only the lumbar spine and recommended a 5% impairment. Dr. Mukkamala's original assessment recommended a 6% impairment, but the most recent assessment recommended a 15% impairment. Dr. Poletajev's assessment recommended a 38% impairment, including 4% for the thoracic spine.

The Office of Judges, in reversing the claims administrator's 11% permanent partial disability award, relied on the report of Dr. Mukkamala to grant Mr. Fouch a 15% permanent partial disability award. Mr. Fouch argues that Dr. Poletajev's report is the most reliable, and thus he is entitled to a 38% award. Spartan Mining Company disagrees and asserts that the 15% award is legally sound and based upon abundant medical evidence. The Office of Judges noted that Dr. Poletajev's finding of significant signs of radiculopathy was not substantiated by the neurological findings of any other examining physician. Further, it noted that Dr. Mukkamala's finding of no permanent impairment of the right knee was supported by an MRI. The Office of Judges also noted that because Dr. Grady only evaluated the lumbar spine, his report was not the most persuasive.

In reaching the conclusion that Mr. Fouch was entitled to a 15% permanent partial disability award, the Office of Judges found Dr. Mukkamala's report to be the more persuasive evaluation. The Office of Judges found there was insufficient evidence to provide a 38% permanent partial disability award due to the compensable injuries. The Board of Review reached the same conclusion in its decision of December 15, 2010.

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 Board of Review Order is affirmed.

Affirmed.

ISSUED: July 6, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

Justice Brent D. Benjamin, **Disqualified**