

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 26, 2012

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

DANNY R. KIDWELL, Petitioner

**vs.) No. 11-0064 (BOR Appeal No. 2044660)
(Claim No. 20098038349)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
RALEIGH COUNTY BOARD OF
EDUCATION, Respondent**

MEMORANDUM DECISION

Petitioner, Danny R. Kidwell, by John C. Blair, his attorney, appeals the Board of Review Order granting him 2% permanent partial disability for carpal tunnel syndrome. The Raleigh County Board of Education, by H. Dill Battle III, 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 7, 2010, Order of the Workers' Compensation Office of Judges granting Mr. Kidwell a 2% permanent partial disability award for carpal tunnel syndrome. In its Order, the Office of Judges reversed the claims administrator's Order granting Mr. Kidwell 4% permanent partial disability for carpal tunnel syndrome. 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, response, 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.

Mr. Kidwell states he was operating a frontloader on March 29, 2007, when he struck a rock resulting in cervical pain along with numbness, tingling, and pain in both upper extremities. Prior to the March 27, 2007, incident Mr. Kidwell was diagnosed with bilateral diffuse sensory motor peripheral polyneuropathy. Dr. J. O. Othman diagnosed Mr. Kidwell with right ulnar neuropathy across the elbow and bilateral carpal tunnel syndrome with occasional left C5-6 radiculopathy on April 30, 2006.

Dr. Paul Bachwitt conducted an independent medical evaluation on May 26, 2009, during which it was determined Mr. Kidwell had a 4% impairment for bilateral carpal tunnel syndrome. The claims administrator granted a 4% permanent partial disability award based upon Dr. Bachwitt's findings. On August 25, 2009, Dr. Bruce A. Guberman conducted an independent medical evaluation and noted Mr. Kidwell was diagnosed with diabetes mellitus within the last eight months. Mr. Kidwell's impairment was evaluated pursuant to Tables 11, 12, and 15 of the American Medical Association's, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), and Dr. Guberman ultimately opined a 12% impairment pursuant to West Virginia Code of State Rules § 85-20-64.5. A final independent medical evaluation was conducted by Dr. Marsha L. Bailey on April 1, 2010. Dr. Bailey considered the prior diagnosis of bilateral peripheral polyneuropathy, diabetes mellitus, and obesity in determining Mr. Kidwell's permanent impairment. As a result, Dr. Bailey found 8% impairment (6% for the right hand and 2% for the left hand), however, this amount was apportioned with 75% being attributed to Mr. Kidwell's pre-disposing risk factors, and 2% determined to be work-related.

The Office of Judges found Dr. Guberman did not take into account Mr. Kidwell's morbid obesity or diabetes mellitus, which are significant risk factors for carpal tunnel syndrome, although he acknowledged Mr. Kidwell had these conditions. Also, Dr. Guberman was determined to have incorrectly placed Mr. Kidwell into Grade III for sensory deficits, when the Grade II finding of Dr. Bailey was felt to be more appropriate. The Office of Judges also found Mr. Kidwell was treated for bilateral peripheral neuropathy for at least four years with Neurontin, which is approved by the FDA for diabetes mellitus peripheral neuropathy. Based on this analysis of the evidence, the Office of Judges held Dr. Bailey's report dispositive and granted Mr. Kidwell a 2% permanent partial disability award. The Board of Review held Mr. Kidwell is entitled to a 2% award pursuant to the preponderance of the evidence standard of West Virginia Code § 23-4-1g.

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 Court affirms the Board of Review Order granting Mr. Kidwell 2% permanent partial disability for carpal tunnel syndrome.

Affirmed.

ISSUED: **July 26, 2012**

CONCURRED IN BY:

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum