

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

ROGER D. DAMRON, Petitioner

July 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0137 (BOR Appeal No. 2044739)
(Claim No. 2004011478)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ROCKHOUSE CREEK DEVELOPMENT, Respondent

MEMORANDUM DECISION

Petitioner, Roger D. Damron, by John C. Blair, his attorney, appeals the Board of Review Order granting a 2% permanent partial disability award. The West Virginia Office of Insurance Commissioner, by David Stuart, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 22, 2010, in which the Board affirmed a June 25, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's 8% permanent partial disability award and granted a 2% 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, 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 briefs, and the record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

The Board of Review held Mr. Damron suffers from a 2% permanent partial disability resulting from depression directly attributable to the compensable low back, left shoulder, and neck injuries incurred on September 3, 2003. Mr. Damron asserts the preponderance of the evidence supports the claims administrator's original 8% award or, in the alternative, the recommendation of Dr. Ahmed D. Faheem, finding 12% impairment related to Mr. Damron's depression.

Dr. Ralph S. Smith, M.D., evaluated Mr. Damron on July 27, 2008, at which time it was recommended that Mr. Damron undertake a sleep study to determine if he suffers from sleep apnea. A sleep study conducted by Dr. George L. Zaldivar, M.D., which found sleep apnea / hypopnea syndrome treatable with CPAP. Dr. Smith then recommended 12% impairment when considering all the factors and Mr. Damron's Global Assessment of Functioning Scale (hereinafter "GAF") score of 65. However, Dr. Smith attributed 4% of the impairment to the non-occupational sleep apnea and ultimately recommended 8% impairment attributable to compensable causes. Following this evaluation the claims administrator granted Mr. Damron an 8% permanent partial disability award.

On May 27, 2009, Dr. Ahmed D. Faheem, M.D, evaluated Mr. Damron and found a GAF of 55 and further found a Beck Depression Inventory of 27, moderate impairment, and Beck Anxiety Inventory of 23, severe impairment. As a result, Dr. Faheem recommended a 12% impairment and did not apportion for non-compensable factors. A final evaluation was conducted on January 12, 2010, by Dr. Charles C. Weise, M.D. Dr. Weise diagnosed Mr. Damron with depression, in virtual remission and a GAF of 65. As a result, Dr. Weise recommended a 4% impairment with only 2% attributable to the compensable injuries.

The Office of Judges determined Dr. Smith's finding of Class 3 Impairment, which provides for continuous outpatient treatment, does not apply to Mr. Damron's condition. However, Dr. Smith's other findings were found consistent with classification in the Mild Impairment classification. The other two reports were found to not adhere to the provisions of the grid for determining impairment as required by the guidelines and no report started with the GAF on the lefthand side. The Office of Judges noted both Dr. Smith and Dr. Weise found GAF of 65, while Dr. Faheem found GAF of 55. Dr. Faheem's report was afforded no evidentiary weight since it did contain an outlandish GAF of 55 and failed to account for non-compensable conditions and stressors in Mr. Damron's life.

"[Mr. Damron's] financial status has improved since he turned 60, his wife retired and received a disability award, his son was 'clean', and [Mr. Damron] was getting treatment for his sleep apnea." The Office of Judges believed that Mr. Damron was progressing from his treatment with Dr. Justice, and his monthly counselor meetings. All these findings were considered by the Office of Judges in determining that Mr. Damron has experienced significant improvement following Dr. Smith's evaluation. As a result, the Office of Judges adopted Dr. Weise's recommendation for 2% impairment since this rating is consistent with Mr. Damron's GAF of 65, with some mild symptoms and impairment levels compatible with most useful functioning requiring infrequent outpatient treatment as provided in Class 2 authorizing impairment in the range of 0 - 5%. Thus, the Office of Judges reversed the claims administrator's Order and granted Mr. Damron 2% permanent partial disability. The Board of Review reached the same conclusion in its order of December 22, 2010.

Both Dr. Smith and Dr. Faheem found a total of 12% impairment while reaching differing conclusions regarding Mr. Damron's impairment attributable to the compensable injuries. On the other hand, Dr. Weise only found 4% impairment, which it appears directly results from the GAF

of 65 contained in Dr. Weise's report. West Virginia Code of State Rules § 85-20-12.d.12 requires an assessment of the claimant's impairment pursuant to each of the grids contained in § 85-20-B. This assessment does not turn on one particular section of the Table or another, but requires an overall assessment of impairment pursuant to the table to determine the whole person impairment ratings contained in row 6 and row 7 of the Rule. When considering the evidence according to these provisions it is apparent that the Office of Judges erred in finding Mr. Damron only has a 2% impairment for depression. Accordingly, the Court reverses the Board of Review order granting Mr. Damron 2% permanent partial disability and reinstates the claims administrator's Order granting 8% permanent partial disability.

For the foregoing reasons, we find that the decision of the Board of Review is in clear violation of constitutional or statutory provisions, is so clearly the result of erroneous conclusions of law, and is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. Therefore, the Court reverses the Board of Review Order granting Mr. Damron 2% permanent partial disability. The Court further reinstates the claims administrator's Order granting Mr. Damron an 8% permanent partial disability award.

Reversed and Remanded.

ISSUED: July 26, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

DISSENTING:

Justice Thomas E. McHugh