

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**CHRISTOPHER C. SMITH,
Claimant Below, Petitioner**

FILED
May 24, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-1208 (BOR Appeal No. 2045624)
(Claim No. 2009057021)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
Commissioner Below, Respondent**

and

**TIM MARTIN,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Christopher C. Smith, by John Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by David Stuart, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated July 27, 2011, in which the Board affirmed a February 17, 2011,¹ Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 1, 2009, decision granting Mr. Smith a 5% permanent partial disability award for his left ankle injury. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record

¹ In its July 27, 2011, decision, the Board of Review affirmed the February 17, 2011, decision of the Office of Judges. On February 22, 2011, the Office of Judges issued a corrected Order reflecting that the West Virginia Office of Insurance Commissioner is acting in its capacity as administrator of the Uninsured Fund. The Office of Judges' findings of fact and conclusions of law remain unchanged from the February 17, 2011, Order.

presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Smith fractured his left ankle when he slipped and fell on wet ground on May 19, 2008, while working as a landscaper. The fracture was treated with internal fixation. Mr. Smith has undergone three independent medical evaluations to determine the amount of permanent impairment resulting from this injury. On April 20, 2009, Dr. Landis found 4% whole person impairment for range of motion abnormalities and 1% whole person impairment for tenderness over Mr. Smith's surgical incision, and therefore recommended a 5% permanent partial disability award. On April 13, 2010, Dr. Guberman examined Mr. Smith and found 8% whole person impairment based on muscle atrophy in the left leg. He recommended an additional 3% permanent partial disability award since Mr. Smith had already been granted a 5% permanent partial disability award for the May 19, 2008, injury. On September 21, 2010, Dr. Mukkamala performed an independent medical evaluation, found 4% whole person impairment for range of motion abnormalities, and further found that Mr. Smith was fully compensated by the prior 5% permanent partial disability award. He noted that Dr. Landis found an additional 1% whole person impairment for scar tenderness, and concurred with Dr. Landis's recommendation of a 5% permanent partial disability award despite finding no evidence of tenderness at the time of his evaluation. He further found that Dr. Guberman's findings in relation to muscle atrophy could not be substantiated.

In its Order affirming the October 1, 2009, claims administrator's decision, the Office of Judges held that Mr. Smith is entitled to a 5% permanent partial disability award for the May 19, 2008, injury. Mr. Smith disputes this finding and asserts, per the opinion of Dr. Guberman, that he is entitled to an 8% permanent partial disability award for the May 19, 2008, injury.

The Office of Judges found that Dr. Guberman's findings relating to muscle atrophy were not reproduced when Mr. Smith was examined by Dr. Mukkamala. The Office of Judges then found that due to this inconsistency, greater weight should be given to the opinions of Dr. Landis and Dr. Mukkamala, who both found that a 5% permanent partial disability award is appropriate in relation to the May 19, 2008, injury. The Board of Review reached the same reasoned conclusions in its decision of July 27, 2011. We agree with the reasoning and conclusions of the Board of Review.

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 decision of the Board of Review is affirmed.

Affirmed.

ISSUED: May 24, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II