

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

RICHARD L. BROWN,
Claimant Below, Petitioner

vs.) No. 11-1408 (BOR Appeal No. 2045710)
(Claim No. 2007213378)

UNITED PARCEL SERVICE, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Richard L. Brown, by Gregory S. Prudich, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. United Parcel Service, Inc., by Jeffrey B. Brannon, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated September 14, 2011, in which the Board affirmed a March 14, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 2, 2009, decision granting Mr. Brown a 2% permanent partial disability award in addition to his prior 1% permanent partial disability award. 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 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. Brown was employed by the United Parcel Service, Inc., as a driver on November 8, 2006, when he injured his right shoulder pushing a large package onto a truck. The claims administrator approved his claim for medical expenses on a no-loss basis for a right coracoclavicular ligament sprain and granted him a 1% permanent partial disability award, based on the evaluation of Dr. Grady. Mr. Brown was then granted authorization for arthroscopic repair of his right shoulder, which was performed by Dr. Morgan, on March 18, 2009. Following the surgery, the claims administrator requested that Dr. Grady re-evaluate Mr. Brown's whole

person impairment. Dr. Grady determined that Mr. Brown had a 5% right upper extremity impairment for loss of range of motion which translated into a 3% whole body impairment based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). Based on Dr. Grady's report the claims administrator granted Mr. Brown an additional 2% permanent partial disability award for a total of 3% permanent partial disability. The Office of Judges and the Board of Review affirmed the decision of the claims administrator on March 14, 2011, and September 14, 2011, respectively, leading Mr. Brown to appeal.

The Office of Judges found by a preponderance of the evidence that Mr. Brown has 3% whole person impairment as a result of his compensable injury. The Office of Judges concluded that, since Mr. Brown had previously been granted a 1% permanent partial disability award, the claims administrator was correct to grant Mr. Brown an additional 2% permanent partial disability award. In making its determination, the Office of Judges relied upon the reports of Dr. Grady and Dr. Mukkamala. The Office of Judges found that both reports made consistent factual determinations and impairment recommendations. Both reports stated that Mr. Brown had equal bilateral grip strength and found no instability or crepitus in the right shoulder. Both doctors found that Mr. Brown had 3% whole body impairment based on his compensable injury. Although the Office of Judges considered the report of Dr. Poletajev, who recommended a 9% whole person impairment rating, it found the report unreliable. The Office of Judges found that Dr. Poletajev's report was inconsistent with the weight of the medical evidence and the other doctor's reports.

The Board of Review adopted the findings of the Office of Judges and affirmed its Order on September 14, 2011. We agree with the Order of the Board of Review and the reasoning of the Office of Judges. The Office of Judges was within its discretion in weighing the preponderance of the evidence and its determination is supported by the record as a whole. The Board of Review was correct to affirm its Order.

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: October 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