

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

EUGENE R. PETTIT,
Claimant Below, Petitioner

vs.) No. 11-1759 (BOR Appeal No. 2046076)
(Claim No. 2010105105)

ALEX ENERGY, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Eugene R. Pettit, by Linda Garrett, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Alex Energy, Inc., by Sean Harter, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated November 29, 2011, in which the Board affirmed a June 10, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 29, 2010, decision, which granted Mr. Pettit an 8% 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. Pettit was injured on September 9, 2009, while working for Alex Energy, when part of the roof of an underground mine dislodged and fell on his head. The claim was held compensable for a fractured vertebral column. Following a period of treatment, Mr. Pettit was evaluated by Dr. Grady who found 17% impairment under the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) based on loss of range of motion and two fractures in Mr. Pettit's cervical spine. Dr. Grady then reduced this percentage to an 8% whole person impairment recommendation to fit within Category II of West Virginia

Code of State Rules § 85-20-E (2006). Based on Dr. Grady's recommendation, the claims administrator granted Mr. Pettit an 8% permanent partial disability award on March 29, 2010. Mr. Pettit was then evaluated by Dr. Scott who found an 18% impairment rating under the American Medical Association's *Guides*. Dr. Scott then placed Mr. Pettit in Category III for cervical spine impairment based on restrictions in range of motion and decreased strength. Dr. Scott recommended an 18% whole person impairment rating. Finally, Mr. Pettit was evaluated by Dr. Mukkamala who found a 17% impairment rating under the American Medical Association's *Guides* and placed Mr. Pettit within Category II for cervical injuries because he found no objective evidence of radiculopathy despite Mr. Pettit's subjective complaints. Dr. Mukkamala also recommended an 8% whole person impairment rating. The Office of Judges affirmed the claims administrator's decision on June 10, 2011. The Board of Review then affirmed the Order of the Office of Judges on November 29, 2011, leading Mr. Pettit to appeal.

The Office of Judges concluded that Mr. Pettit was in Category II under West Virginia Code of State Rules § 85-20-E for his cervical spine injury and was entitled to an 8% permanent partial disability award. The Office of Judges attributed significant weight to the findings of Dr. Grady and Dr. Mukkamala who both found that Mr. Pettit had whole person impairment of 17% under the American Medical Association's *Guides*, which they both reduced to an 8% rating under Category II of West Virginia Code of State Rules § 85-20-E. The Office of Judges found that Dr. Scott miscalculated Mr. Pettit's impairment under the American Medical Association's *Guides* by failing to properly combine his impairment for loss of range of motion and for cervical fractures. The Office of Judges attributed less weight to Dr. Scott's findings. The Office of Judges further determined that Dr. Grady and Dr. Mukkamala sufficiently explained why they placed Mr. Pettit's injury in Category II. The Board of Review adopted the finding of the Office of Judges and affirmed its Order.

We agree with the conclusion of the Board of Review and the findings of the Office of Judges. The preponderance of the evidence in the record weighs in favor of finding that Mr. Pettit is entitled to an 8% permanent partial disability award for his cervical spine injuries. Dr. Grady and Dr. Mukkamala based their recommendations on a correct evaluation of Mr. Pettit's injuries under the American Medical Association's *Guides*. Both physicians also placed Mr. Pettit's injuries into Category II of West Virginia Code of State Rules § 85-20-E for cervical impairment and relied on objective findings for that determination. The Office of Judges was sufficiently justified in placing significant weight on their recommendations.

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:

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II

Chief Justice Brent D. Benjamin, disqualified