

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
March 12, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

EVERETT E. RICE,
Claimant Below, Petitioner

vs.) No. 12-1228 (BOR Appeal No. 2047053)
(Claim No. 2005016796)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
Commissioner Below, Respondent

and

JMAC LEASING, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Everett E. Rice, by John C. Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Brandolyn N. Felton, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated September 21, 2012, in which the Board affirmed a March 21, 2012, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 12, 2010, decision which granted no additional 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. Rice, a heavy equipment operator, injured his lower back in the course of his employment when the piece of heavy equipment he was operating backed over a large rock. He was evaluated by Michael Condaras, D.C., in December of 2004. In that independent medical evaluation, Dr. Condaras determined that Mr. Rice had reached maximum medical improvement for his compensable lumbosacral sprain/strain. Using the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, (4th Edition, 1993), he assessed 5% impairment under Table 75 of the American Medical Association's *Guides* and 7% impairment for range of motion loss. This was combined for a total of 12% impairment. Pursuant to West Virginia Code of State Rules § 85-20-C (2006), that percentage was adjusted to 8% whole person impairment. Based upon this report, the claims administrator granted Mr. Rice an 8% permanent partial disability award.

Victor Poletajev, D.C., evaluated Mr. Rice on October 29, 2009. In that independent medical evaluation, Mr. Rice was again determined to be at maximum medical improvement. Dr. Poletajev diagnosed lumbar sprain/strain with radiculopathy and residuals. He found that straight leg raise was seventy degrees, lumbar flexion was forty-seven degrees, and lumbar extension was thirty-eight degrees. Using the American Medical Association's *Guides*, Dr. Poletajev concluded that Mr. Rice had sustained 5% impairment under Table 75 and 11% impairment for range of motion loss. This was combined for a total of 15% impairment and adjusted to 13% impairment under West Virginia Code of State Rules § 85-20-C. Dr. Poletajev noted in his report that Dr. Condaras's evaluation occurred three months after the compensable injury. He opined that the general consensus in the American Medical Association's *Guides* is that an evaluation for permanent impairment should not be performed until at least six months after an injury.

Over five years after the compensable injury, on April 29, 2010, Paul Bachwitt, M.D., performed an independent medical evaluation. He determined that Mr. Rice suffered from lumbar sprain/strain. Using the American Medical Association's *Guides*, he assessed 5% whole person impairment. Since Mr. Rice had already received a permanent partial disability award of 8%, he opined that no additional award was necessary in this claim.

A final independent medical evaluation was performed on December 15, 2011, by Prasadarao Mukkamala, M.D., In that evaluation, Dr. Mukkamala assessed 8% impairment for loss of range of motion and 5% impairment under Table 75 of the American Medical Association's *Guides*. This was combined for a total of 13% impairment. Pursuant to West Virginia Code of State Rules § 85-20-C, this was adjusted to 8% whole person impairment. Since Mr. Rice had already received an award of 8% permanent partial disability, Dr. Mukkamala recommended that no additional impairment be granted. He noted that Dr. Poletajev's recommendation of 13% impairment was incorrectly calculated, because there was no evidence of radiculopathy found.

The claims administrator granted Mr. Rice no additional permanent partial disability award in its August 12, 2010, decision. The Office of Judges affirmed that decision in its March 21, 2012, Order. It determined that the evidentiary record indicated that Mr. Rice was fully compensated by his previous 8% permanent partial disability award. The Office of Judges found that Dr. Poletajev's findings could not be reproduced or even approached by any other

physicians of record. Additionally, his range of motion studies were determined to be invalid. Under the American Medical Association *Guides*, a lumbar range of motion test is invalid if the tightest straight leg rise exceeds flexion and extension by more than 15%. The Office of Judges concluded that this occurred in Dr. Poletajev's evaluation.

The other reports of record were found to be valid. Dr. Bachwitt and Dr. Mukkamala found essentially no change from Dr. Condaras's 2004 report. The Office of Judges determined that, assuming Dr. Poletajev's findings were accurate, they did not indicate a permanent condition. Lastly, the Office of Judges found that Mr. Rice was diagnosed with a lumbar strain over seven years earlier, and it was highly doubtful that he would develop neurological problems at this late date.

The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order in its September 21, 2012, decision. This Court agrees with the reasoning and conclusions of the Board of Review. Out of the four physicians of record, Dr. Poletajev was the only one to determine that Mr. Rice was entitled to a 13% permanent partial disability award. That determination was based in part upon a finding of radiculopathy. Dr. Condaras evaluated Mr. Rice before Dr. Poletajev and Drs. Bachwitt and Mukkamala evaluated him after. No evidence of radiculopathy was found by any of the three physicians. A preponderance of the evidence indicates Mr. Rice has been fully compensated by his previous 8% permanent partial disability award. The decision of the Board of Review is supported by the evidentiary record.

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: March 12, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II