

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**DEBORAH HARRIS,
Claimant Below, Petitioner,**

**vs.) No. 17-0278 (BOR Appeal No. 2051571)
(Claim No. 2010128905)**

FILED

November 22, 2017
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**ENCORE MANAGEMENT CO., INC.,
Employer Below, Respondent**

MEMORANDUM DECISION

Deborah Harris was granted a 0% permanent partial disability award for a low back injury. We are asked to determine whether the award was proper. We find that that it was based upon the evidentiary record. We further find upon consideration of the standard of review, the briefs, and the record, that there is no substantial question of law or prejudicial error necessitating oral argument. As such, a memorandum opinion is appropriate under Rule 21 of the Rules of Appellate Procedure.

Ms. Harris, a laborer, injured her low back on March 9, 2010, when she was cleaning out a refrigerator. The claim was held compensable for a lumbar sprain/strain. Marsha Bailey, M.D., performed an independent medical evaluation on December 18, 2014. She diagnosed chronic lower back pain without radiculopathy. Dr. Bailey noted a significant amount of symptom magnification with Ms. Harris's subjective complaints grossly outweighing the objective findings. Dr. Bailey found Ms. Harris's range of motion measurements were invalid for rating purposes, as they were all restricted by pain. Using the range of motion model, Dr. Bailey assessed 5% whole person impairment according to Table 75 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). She then adjusted the 5% impairment rating to 0% whole person impairment according to Rule 20 of the West Virginia Code of State Rules (2006). Dr. Bailey opined that Ms. Harris had no significant clinical findings and no neurologic impairment. Dr. Bailey attached the low back examination form she completed as part of her evaluation to her written report. Based on Dr. Bailey's evaluation, the claims administrator granted Ms. Harris a 0% permanent partial disability award on February 9, 2015.

Joseph Snead, M.D., performed an independent medical evaluation on December 16, 2015. He diagnosed lumbar sprain/strain associated with a bulging L3-L4 disc. Dr. Snead assessed 5% whole person impairment according to Table 75 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, and 13% whole person

impairment for restricted range of motion, which combined for 17% whole person impairment. Dr. Snead reduced the 17% impairment to 8% impairment according to Category 2 of Rule 20. The range of motion chart on which Dr. Snead based the 13% impairment for loss of range of motion was not included in his report. Dr. Snead did not include the low back examination form with his written report.

Dr. Bailey prepared an addendum to her report on March 4, 2016. She opined that Dr. Snead made significant errors in his impairment calculation, including the use of the DRE model for his impairment recommendation. Dr. Bailey further opined that Dr. Snead did not use the range of motion model correctly, nor did he apply Rule 20 correctly. He failed to attach the low back examination form to his report, which was required to determine if Ms. Harris met validity criteria. Without the form, it was not possible to determine if the range of motion testing performed by Dr. Snead was valid.

The Office of Judges affirmed the claims administrator's award of 0% permanent partial disability in its September 22, 2016, Order. It noted that the two independent medical evaluation reports in the record contained vastly different impairment ratings. Dr. Bailey assessed 0% impairment, while Dr. Snead assessed 17% impairment. The Office of Judges found the report of Dr. Bailey to be the more accurate and reliable assessment of impairment. West Virginia Code of State Rules §85-20-66.2 (2006) requires that all narrative reports include a completed low back examination form. A report and opinion submitted without a completed low back examination form had to be disregarded. As Dr. Snead failed to include the low back examination form, his report had to be disregarded. Dr. Bailey's report met the documentation requirements of Rule 20. Therefore, Dr. Bailey's report provided the only accurate and reliable assessment of impairment in this claim.

The Board of Review modified and adopted the findings of fact and conclusions of law of the Office of Judges when it affirmed the Office of Judges' Order on February 21, 2017. The Board of Review modified the Order to reflect that Dr. Snead found Ms. Harris had 17% impairment under the range of motion model and that he adjusted his rating to 8% impairment. It also noted Ms. Harris was seeking a 5% permanent partial disability award. However, it did not appear that a physician had assessed 5% impairment, nor recommended a 5% permanent partial disability award. The Board of Review noted that in *Baria v. Capitol Beverage Company*, No. 15-0056, 2015 WL 5883444 (W.Va. Oct. 7, 2015)(memorandum decision) we found that utilizing select findings from medical reports would not form a reliable basis for assessing the amount of whole person impairment and resulting disability award.

Ms. Harris, through her attorney Robert Stultz, argues she is entitled to an award of 5% permanent partial disability. Encore Management Company, Inc., through its attorney Lisa Warner Hunter, argues the reliable evidence of record supports the 0% permanent partial disability award.

After review, we agree with the findings of fact and conclusions of law of the Office of Judges as adopted and modified by Board of Review. It did not err when it relied on Dr. Bailey's opinion and assessment of impairment of Ms. Harris. Ms. Harris failed to submit a reliable

assessment of her impairment that could have been used to support an increased permanent partial disability award.

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: November 22, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Elizabeth D. Walker

DISSENTING:

Justice Menis E. Ketchum