

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

September 13, 2019
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JEFFREY S. DAY,
Claimant Below, Petitioner

vs.) No. 18-0934 (BOR Appeal No. 2052960)
(Claim No. 2014000994)

PARKER PROCESSING, LLC, LWF,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Jeffrey S. Day, by Counsel Gregory S. Prudich, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Parker Processing, LLC, LWF, by Counsel Bradley A. Crouser, filed a timely response.

The issue on appeal is permanent partial disability. The claims administrator granted a 3% permanent partial disability award on December 19, 2016. The Office of Judges affirmed the decision in its May 29, 2018, Order. The Order was affirmed by the Board of Review in its Order entered on September 26, 2018.

The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration. 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. Day, a plant AT, was injured in the course of his employment on July 1, 2013, when he fell into a drain. He was treated for the compensable injury by Robert Kropac, M.D., who initially diagnosed a lumbosacral strain and a left knee sprain, ruled out medial meniscus tear. On July 31, 2013, an MRI showed fluid in the knee but no tear. A lumbar MRI was performed on August 20, 2013, and showed degenerative disc disease at L4-5 with a disc protrusion causing significant compromise of the left lateral recess and impinging on the L5 nerve root. There was a small protrusion at L5-S1. Dr. Kropac noted that an MRI taken in October of 2004 showed only an annular tear. Dr. Kropac diagnosed left knee contusion and lumbar disc herniation with left lower extremity radiculopathy. On March 17, 2014, Dr. Kropac noted that Mr. Day had to

discontinue physical therapy and was to have a functional capacity evaluation. He stated Mr. Day was at maximum medical improvement but needed a vocational rehabilitation assessment. In a March 17, 2014, addendum, Dr. Kropac stated that he requested Mr. Day be evaluated by neurosurgeon, Dr. Sweasey, for his lumbar disc herniation with radiculopathy. He again requested authorization for Mr. Day to see Dr. Sweasey for evaluation of his lumbar disc herniation with lower extremity radiculitis on April 30, 2014.

Mr. Day returned to Dr. Kropac on May 8, 2014, and reported that he continued to have back pain and some knee pain. Dr. Kropac again stated he was at maximum medical improvement. He noted that a functional capacity evaluation found Mr. Day to be at the sedentary physical demand level. Dr. Kropac therefore released him to return to work at a sedentary level. On January 19, 2015, Dr. Kropac ordered physical therapy due to increased lower back pain. On June 8, 2016, he wrote a diagnosis update requesting that lumbar disc herniation with left lower extremity radiculopathy be added to the claim. On August 11, 2015, he noted that Mr. Day's range of motion in the lumbar spine was limited due to pain. Dr. Kropac requested a repeat lumbosacral MRI. The MRI was performed on April 21, 2016, and showed mild disc desiccation at L4-5 and L5-S1; a small broad based paracentral disc bulge at L4-5 causing mild lateral recess compression; and mild bilateral neural foraminal stenosis at L4-5 due to facet arthropathy. Dr. Kropac noted that he told Mr. Day the disc herniation was no longer visible and that the MRI only showed degenerative changes and insignificant bulges.

On April 18, 2014, Joseph Grady, M.D., performed an independent medical evaluation in which he noted that Mr. Day was thrown from a horse in 2004 and suffered annular tearing and disc bulging from L4-S1. Dr. Grady opined that lumbar surgery was unnecessary because there are no radicular symptoms due to the compensable conditions, which are lumbosacral and sacroiliac sprains. Dr. Grady found that Mr. Day had reached maximum medical improvement and assessed 5% impairment for the lumbar spine and 0% for the left knee. Based on Dr. Grady's evaluation, the claims administrator granted a 5% permanent partial disability award on May 14, 2014.

On March 22, 2016, by Order of the Office of Judges, herniated lumbar disc was added to the claim. Dr. Grady performed a second independent medical evaluation on November 29, 2016, in which he diagnosed lumbosacral myofascial strain superimposed on multilevel lumbar spondylosis. He noted that the MRI showed disc bulging from L4-S1 but that no impingement was seen. For the lumbar spine, Dr. Grady used Table 75IIB of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), and found 5% impairment. For loss of range of motion he assessed 12% impairment. Using West Virginia Code of State Rules § 85-20-C (2006), Dr. Grady placed Mr. Day in Lumbar Category II and adjusted the impairment to 8%. Given that Mr. Day had already received a 5% award, Dr. Grady recommended an additional 3% award. The claims administrator granted an additional 3% permanent partial disability award on December 19, 2016.

David Rupp, M.D., performed an independent medical evaluation on March 27, 2017, in which he found 12% left knee impairment. For the lumbar spine, he found 5% under Table 75IIB of the American Medical Association's *Guides* and 21% for loss of range of motion. Using West

Virginia Code of State Rules § 85-20-C, Dr. Rupp placed Mr. Day in Lumbar Category II and adjusted his impairment rating to 8%. His lumbar and left knee impairments combined for 19% whole person impairment. Dr. Rupp therefore recommended an additional 14% award.

On June 26, 2017, Saghir Mir, M.D, performed an independent medical evaluation in which he opined that Drs. Rupp and Kropac were not familiar with Mr. Day's 2004 injury. Dr. Mir noted that neither Dr. Kropac nor Dr. Grady found significant problems with the left knee. Dr. Mir opined that the knee sprain had resolved and that Mr. Day had a lumbosacral strain superimposed on preexisting degenerative changes. Dr. Mir found 13% lumbar impairment per West Virginia Code of State Rules § 85-20-C, placed Mr. Day in Lumbar Category II, and adjusted the rating to 8%. He assessed 0% left knee impairment.

Prasadarao Mukkamala, M.D., performed an independent medical evaluation on November 3, 2017, in which he assessed 4% left knee impairment. He noted that Mr. Day had a prior left knee injury, and x-rays taken in July of 2013 showed a preexisting avulsion fracture versus a calcification of the femoral condyle at the attachment of the medial collateral ligament, as well as thickening of the medial collateral ligament. He apportioned 2% of the knee impairment for preexisting conditions. For the lumbar spine, he found 13% impairment for loss of range of motion and 5% from Table 75IIB of the American Medical Association's *Guides* for a total of 17% impairment. He placed Mr. Day in Lumbar Category II from West Virginia Code of State Rules § 85-20-C and adjusted the impairment to 8%. He then apportioned 4% for preexisting conditions based upon the October of 2004 MRI findings. His total impairment recommendation was 6%.

The Office of Judges affirmed the claims administrator's decision granting an additional 3% award in its May 29, 2018, Order. It began by noting that the compensable conditions in the claim are lumbosacral sprain, herniated lumbar disc, and left knee sprain. It determined that the 3% award was based on Dr. Grady's evaluation, to which Mr. Day was referred for an impairment rating of his herniated disc. The Office of Judges found that the purpose of the evaluation was to rate the herniated disc only. It found Dr. Grady's assessment of an additional 3% impairment to be reliable. The Office of Judges determined that Dr. Rupp's report was not reliable because he rated the lumbar spine twice, once for the lumbar sprain and once for the herniated disc. He also rated Mr. Day's knee, which the Office of Judges determined was improper because he was only to receive an impairment assessment for the additional condition of herniated lumbar disc. It was not a reopening of the case for permanent partial disability. The Office of Judges noted that Dr. Mir assessed 8% impairment for the lumbar spine, which correlated with Dr. Grady's rating. Finally, the Office of Judges found that Dr. Mukkamala also assessed 8% lumbar spine impairment, though he apportioned half to preexisting conditions. The Office of Judges concluded that Mr. Day failed to show that he is entitled to more than an 8% permanent partial disability award. Because he had already received a 5% award, the Office of Judges affirmed the claims administrator's grant of an additional 3% award. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on September 26, 2018.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Mr. Day was evaluated by several physicians, the majority of

whom found 8% lumbar spine impairment. Dr. Rupp's report is out of line with the other evaluations of record and is not supported by the medical evidence. A preponderance of the evidence shows Mr. Day is not entitled to more than the 8% permanent partial disability award he has already received.

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: September 13, 2019

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker

Justice Margaret L. Workman

Justice Evan H. Jenkins

Justice John A. Hutchison

Justice Tim Armstead, not participating.