

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED

March 19, 2021
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MURRAY AMERICAN ENERGY, INC.,
Employer Below, Petitioner

vs.) No. 20-0130 (BOR Appeal No. 2054550)
(Claim No. 2017021230)

CHRISTOPHER JOHNSON,
Claimant Below, Respondent

MEMORANDUM DECISION

Petitioner Murray American Energy, Inc., by Counsel Denise D. Pentino and Aimee M. Stern, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Christopher Johnson, by Counsel J. Thomas Greene and T. Colin Greene, filed a timely response.

The issue on appeal is permanent partial disability. The claims administrator granted a 2% permanent partial disability award on August 9, 2018. The Workers' Compensation Office of Judges ("Office of Judges") reversed the decision in its August 28, 2019, Order and granted a 6% award. The Order was affirmed by the Board of Review on January 24, 2020.

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. Johnson, a coal miner, was injured in the course of his employment on February 28, 2017. The Employees' and Physicians' Report of Injury, completed that day, indicates Mr. Johnson injured his neck when he struck his head at work. The physicians' section was completed at Preston Urgent Care/Family Practice and stated that Mr. Johnson sustained a work-related neck injury. Mr. Johnson was treated for the compensable injury by Peggy Phillips, FNP, from Preston Urgent Care/Family Practice. He reported pain in his neck and jaw as well as limited cervical range of motion. Mr. Johnson was diagnosed with neck strain. A cervical spine x-ray performed that day

showed no fracture or dislocation. There were degenerative changes from C3-C7. The claim was held compensable for neck strain on March 13, 2017.

Mr. Johnson underwent a cervical MRI on September 28, 2017, which showed minimal degenerative changes. In a January 29, 2018, neurological consultation, Donald Hoffman, M.D., noted that Mr. Johnson had persistent pain that was managed with chiropractic treatment and medication. He further noted that diagnostic imaging showed degenerative changes and a dramatic reversal of the cervical spine curvature. Dr. Hoffman opined that the reversal of the cervical spine curvature is likely a congenital problem and diagnosed neck pain due to degenerative disc disease.

On August 1, 2018, Joseph Grady, M.D., performed an independent medical evaluation in which he found that Mr. Johnson had reached maximum medical improvement. He found no ratable impairment under Table 75 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). Using range of motion measurements, Dr. Grady found 3% cervical impairment. He placed Mr. Johnson in Cervical Category II from West Virginia Code of State Rules § 85-20-E and adjusted the rating to 5%. Dr. Grady then apportioned 3% for preexisting, multilevel degenerative changes. The claims administrator granted a 2% permanent partial disability award on August 9, 2018.

Karl Boone, D.C., performed an independent medical evaluation on November 29, 2018, in which he found 4% impairment under Table 75 of the AMA *Guides*. For range of motion, Dr. Boone assessed 2% impairment. He placed Mr. Johnson in Cervical Category II from West Virginia Code of State Rules § 85-20-E and assessed 6% impairment. Dr. Boone did not apportion for preexisting impairment. Dr. Boone stated that Mr. Johnson had minimal degenerative changes and no preexisting cervical spine range of motion issues.

The Office of Judges reversed the claims administrator's grant of a 2% permanent partial disability award and granted a 6% award in its August 28, 2019, Order. It found that Dr. Grady assessed 5% impairment and apportioned 3% to preexisting degenerative conditions. Dr. Boone assessed 6% impairment and did not apportion the rating. The Office of Judges found Dr. Boone's report to be the most reliable. Both of the IMEs of record noted that Mr. Johnson had no cervical problems or symptoms prior to the compensable injury, and a cervical MRI showed minimal degenerative change. The Office of Judges also found that Mr. Johnson had no treatment for the cervical spine prior to the compensable injury. The Office of Judges noted that Dr. Boone rated 4% impairment for "intervertebral disc or other soft-tissue lesion." The record shows that Mr. Johnson was diagnosed with a soft tissue injury; therefore, the assessment was appropriate. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on January 24, 2020.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Dr. Boone's assessment is, at the least, as reliable as that of Dr. Grady. Further, the Office of Judges was correct to find that Dr. Boone supported his decision not to apportion, and his rating was properly adopted.

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 so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board of Review's findings, reasoning and conclusions, there is insufficient support to sustain the decision. Therefore, the decision of the Board of Review is affirmed.

Affirmed

ISSUED: March 19, 2021

CONCURRED IN BY:

Chief Justice Evan H. Jenkins
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton