

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 5, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BETTY R. MARCUM, Petitioner

vs.) **No. 35607** (BOR Appeal No. 2042453)
(Claim No. 2006006875)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WAYNE COUNTY BOARD OF EDUCATION,
Respondent**

MEMORANDUM DECISION

Petitioner, Betty Marcum, by John C. Blair, her attorney, appeals the West Virginia Workers' Compensation Board of Review's Order. The West Virginia Office of Insurance Commissioner, by Brian Maconaughey, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order of August 19, 2009, in which the Board reversed a December 19, 2008, Order of the Office Judges which granted the petitioner a 12% permanent partial disability award. In its Order, the Office of Judges reversed the claims administrator's decision to grant the petitioner a 2% permanent partial disability award. In reversing the Office of Judges, the Board granted the claimant a 4% permanent partial disability award. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Ms. Marcum was working as a custodian for the Wayne County Board of Education when she filed a report of injury on August 22, 2005, alleging an injury on March 22, 2005. The claim involved injury to the right and left wrists. A report of an EMG and NCV study conducted

by Dr. Joby Joseph was suggestive of bilateral carpal tunnel syndrome, of moderate degree. On January 30, 2007, Dr. Glenn Goldfarb also diagnosed the petitioner with bilateral carpal tunnel syndrome, with mild severity. Dr. Paul Bachwitt diagnosed the petitioner with bilateral carpal tunnel syndrome with no clinical signs of carpal tunnel syndrome on the left. Dr. Bachwitt utilized Table 16 and applied his interpretation of Rule 20 to determine that the claimant was entitled to a 2% whole-person impairment on the right and 0% whole-person impairment for the left carpal tunnel syndrome. Based upon Dr. Bachwitt's recommendation, the claims administrator granted Ms. Marcum a 2% permanent partial disability award for her carpal tunnel syndrome.

Victor Poletajev, D.C., diagnosed the petitioner with bilateral carpal tunnel syndrome of mild to moderate degree with post-surgical residuals of the right wrist. Dr. Poletajev used Table 11 and Table 15 and found that Ms. Marcum has 10% impairment for both the left and right wrists. He interpreted Rule 20 to rate the claimant as 6% whole body impairment for mild to moderate right wrist carpal tunnel syndrome with residuals and 6% whole body impairment for mild to moderate left wrist carpal tunnel syndrome with residuals. He applied Rule 20 in finding 6% whole body impairment for the carpal tunnel syndrome for each wrist.

Dr. Prasadarao B. Mukkamala diagnosed the petitioner with carpal tunnel syndrome, status post surgical release of right carpal tunnel syndrome on August 19, 2008. Dr. Mukkamala used Tables 11, 12 and 15 and concluded that the petitioner suffers a combined total of 4% whole-person impairment for residual symptoms from carpal tunnel syndrome. He apportioned 2% to the compensable injury and 2% to the non-occupational risk factors of excess weight. Dr. Mukkamala determined that Dr. Poletajev's findings were erroneous and unreliable due to alleged exaggerated sensory deficit measurements.

On December 19, 2008, the Office of Judges reversed the claims administrator and granted the petitioner a 12% permanent partial disability award. The Office of Judges found that the preponderance of the evidence supported a finding of 6% permanent partial disability for each wrist, as opined by Dr. Poletajev. Dr. Bachwitt's report was discredited because he erroneously interpreted Rule 20 to reduce his finding to 2% whole-person impairment. The Office of Judges believed Dr. Poletajev's report to be more reliable than the report from Dr. Mukkamala, who made an apportionment finding that 2% of the impairment is due to excess weight.

The Board of Review reversed the Office of Judges decision based upon the report of Dr. Mukkamala. The Board found Dr. Mukkamala's impairment rating of 4% prior to apportionment to be the most reliable rating. On August 19, 2009, the Board granted Ms. Marcum 4% permanent partial disability award. We disagree with the Board's reasoning. The Office of Judges correctly identified the report from Dr. Poletajev as the most reliable recommendation of permanent partial disability.

For the foregoing reasons, we find that the decision of the Board of Review is clearly the result of an erroneous conclusion of law. The Board of Review Order is reversed and the Office of Judges order is reinstated.

Reversed.

ISSUED: December 5, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin