

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Rhonda L. Maynor,
Claimant Below, Petitioner

vs.) **No. 22-0265** (BOR Appeal No. 2057481)
(JCN: 2017014927)

Raleigh County Board of Education,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Rhonda L. Maynor appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent Raleigh County Board of Education filed a timely response.¹ The issue on appeal is a request to reopen the instant claim for consideration of an additional permanent partial disability award. The claims administrator denied reopening on May 7, 2021. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the claims administrator's decision in its October 19, 2021, order. The order was affirmed by the Board of Review on March 21, 2022. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the Board of Review's decision is appropriate. *See* W. Va. R. App. P. 21.

Petitioner, a school aide, injured her lower back in the course of her employment on November 28, 2016, when she bent over to wipe a child's face. According to the physician's section of the Report of Occupational Injury, dated December 16, 2016, the claimant was diagnosed with a lumbar sprain. A January 31, 2017, MRI showed disc bulging at L2-L3, L3-L4, and L4-L5. The claims administrator held the instant claim compensable for a lumbar sprain on February 3, 2017.

Also, on February 3, 2017, Rocky Sexton, D.C., requested the addition of lumbar intervertebral disc disorder and lumbar radiculopathy as compensable components of the instant claim. The claims administrator denied the request for additional compensable conditions on February 13, 2017. At the time of the compensable injury, petitioner already had a history of lower back pain. Treatment notes from Prakash Puranik, M.D., indicate that petitioner presented in 2015 with lower back, right buttock, right hip, and left knee pain. Dr. Puranik diagnosed lumbago (lower

¹Petitioner is represented by Reginald D. Henry, and respondent is represented by Steven K. Wellman and James W. Heslep.

back pain) and osteoarthritis of the pelvis, hip, and thigh. On November 11, 2016, which was seventeen days before the compensable injury occurred, petitioner was diagnosed with sacroiliitis.

The Office of Judges affirmed the rejection of the addition of lumbar intervertebral disc disorder and lumbar radiculopathy as compensable conditions on April 13, 2018. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed by order of September 20, 2018. In *Maynor v. Raleigh County Board of Education*, No. 18-0912, 2019 WL 4415768 (W. Va. Sept. 13, 2019) (memorandum decision), this Court affirmed the Board of Review's September 20, 2018, decision. This Court found that "the simple act of bending over" did not cause degenerative changes in petitioner's lower back. *Id.* at *2. Instead, "[t]he record shows that these problems preexisted the compensable injury and are therefore not compensable." *Id.*

While the issue of additional compensable diagnoses was in litigation, petitioner was seen on June 20, 2018, by Joseph E. Grady, II, M.D., for an independent medical evaluation. Dr. Grady assessed petitioner with a lumbosacral myofascial sprain superimposed on multilevel lumbar spondylosis. There were no signs of radiculopathy. Dr. Grady placed petitioner in Category II of the lumbar impairment chart set forth as a part of West Virginia Code of State Rules § 85-20-1 (2006).² Using this chart, and based upon petitioner's range of motion, Dr. Grady found 5% impairment. Dr. Grady apportioned 2% impairment to "unrelated structural abnormalities" and found that petitioner had 3% impairment due to the instant compensable injury.³ The claims administrator granted petitioner a 3% permanent partial disability award on August 14, 2018. The Office of Judges affirmed the 3% permanent partial disability award on August 19, 2019. Petitioner did not appeal the Office of Judges' August 19, 2019, order.

Approximately a year and a half later, petitioner underwent an independent medical evaluation on April 21, 2021, by Michael J. Kominsky, D.C. Dr. Kominsky found that petitioner had 13% impairment from both range of motion limitations and the disc bulging at L2-L3 and L3-L4. In accordance with Category II of the lumbar impairment chart, Dr. Kominsky reduced his impairment rating to 8% impairment. Dr. Kominsky opined that all of the 8% impairment was due to the instant compensable injury. Regarding the preexisting degenerative disc disease, Dr. Kominsky stated that clinical studies have shown that degenerative disc disease does not cause a loss of range of motion. Thus, Dr. Kominsky attributed the disc bulging revealed on MRI results at L2-L3 and L3-L4 to the instant compensable injury, and he did not apportion any of the impairment to a preexisting condition. Dr. Kominsky found that the disc defects affecting petitioner's lumbar spine constituted a major component of the compensable injury with resulting loss of motion.

²For lumbar conditions placed in Category II, the permissible impairment range is 5% to 8%.

³For permanent partial disability awards, West Virginia Code § 23-4-9b mandates that a preexisting disease or injury shall not be taken into consideration in fixing the amount of compensation.

On May 4, 2021, petitioner requested that the instant claim be reopened for consideration of an additional permanent partial disability award based on Dr. Kominsky's report. The claims administrator denied the reopening request on May 7, 2021, stating that Dr. Kominsky's report represented merely a difference of opinion about petitioner's preexisting conditions and the amount of impairment attributable to those conditions. In its October 19, 2021, order, the Office of Judges affirmed the claims administrator's decision denying a reopening. The Office of Judges found that this Court's decision in *Maynor* resulted in a lumbar sprain being the only compensable diagnosis in the instant claim. Accordingly, the Office of Judges concluded that "Dr. Kominsky's impairment rating is unreliable . . . as it does not account for apportionment of pre-existing conditions which is supported by the evidence of record and fails to establish an aggravation or progression of the compensable lumbar sprain/strain." The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed the order on March 10, 2022.⁴

This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review, and when the Board's decision affirms prior rulings by both the Workers' Compensation Commission and the Office of Judges, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is based upon a material misstatement or mischaracterization of the evidentiary record. *See* W. Va. Code §§ 23-5-15(c) & (d). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. Ins. Comm'n*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

Pursuant to the Workers' Compensation Act, West Virginia Code §§ 23-1-1 to 23-6-3, to reopen a claim, "the claimant must show a prima facie cause, which means nothing more than any evidence which would tend to justify, but not to compel the inference that there has been a progression or aggravation of the former injury." Syl., *Harper v. State Workmen's Comp. Comm'r*, 160 W. Va. 364, 234 S.E.2d 779 (1977). For permanent partial disability awards, West Virginia Code § 23-4-9b mandates that a preexisting disease or injury shall not be taken into consideration in fixing the amount of compensation.

After review, we find no error in the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. While Dr. Kominsky stated that clinical studies supported his view that that degenerative disc disease does not cause a loss of range of motion, Dr. Kominsky did not provide citations to such studies in his report and no such studies are found in petitioner's appendix. We have stated that we must "take as non[-]existing all facts that do not appear in the [appendix] record and will ignore those issues where the missing record is needed to give factual support to the claim." *State v. Honaker*, 193 W. Va. 51, 56 n.4, 454 S.E.2d 96, 101 n.4 (1994). In addition, in *Maynor*, we affirmed the finding that the record in this claim revealed that the degenerative changes in petitioner's lower back preexisted the instant compensable injury. *See Maynor*, 2019 WL 4415768, at *2. Pursuant to West Virginia Code § 23-4-9b, impairment attributable to those degenerative changes cannot be awarded as permanent partial disability. Dr. Kominsky did not attribute any of the impairment he found to the preexisting degenerative

⁴The Board of Review made minor corrections to the Office of Judges' October 19, 2021, order that are not relevant to this appeal.

changes. Therefore, we conclude that the Office of Judges properly determined that Dr. Kominsky's report did not constitute a reliable basis on which petitioner could show that a reopening was justified under *Harper*.

Affirmed.

ISSUED: January 25, 2024

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn