

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Robert L. Moss,
Claimant Below, Petitioner

vs.) **No. 22-0360** (BOR Appeal No. 2057516)
(JCN: 2017020079)

Blackhawk Mining, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Robert L. Moss appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent Blackhawk Mining, LLC, filed a timely response.¹ The issue on appeal is permanent partial disability. The claims administrator denied a request to reopen the claim for permanent partial disability benefits on July 9, 2021. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the decision in its November 1, 2021, Order. The Order was affirmed by the Board of Review on April 21, 2022. 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). 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*.

Mr. Moss, a coal miner, injured his head, neck, and shoulders while working in respondent's coal mine in 2017 when he was struck by a rock. The claim was ruled compensable for concussion and right shoulder contusion. Bruce Guberman, M.D., performed an independent medical evaluation in which he determined that Mr. Moss had reached maximum medical improvement. Dr. Guberman assessed 4% impairment after apportioning for preexisting degenerative changes. Mr. Moss was also seen by Prasadarao Mukkamala, M.D., for an independent medical evaluation. Dr. Mukkamala also found that Mr. Moss had reached maximum medical improvement, but he assessed 1% impairment. Based on his evaluation, the claims

¹Petitioner, Robert L. Moss, is represented by Reginald D. Henry, and respondent, Blackhawk Mining, LLC, is represented by Billy R. Shelton.

administrator granted a 1% permanent partial disability award. The Office of Judges reversed the decision in a November 6, 2019, order, and granted an additional 3% impairment for a total of 4% permanent partial disability. The Office of Judges found that Dr. Guberman's report was the most accurate of record and that he apportioned for impairment, which was consistent with pre-injury treatment notes. The Office of Judges noted that Dr. Mukkamala also performed an evaluation, but his evaluation was less reliable because he failed to discuss and/or apportion for Mr. Moss's preexisting degenerative changes.

Dr. Guberman performed a second independent medical evaluation and completed a report at Mr. Moss's request, in which he opined that Mr. Moss's right shoulder symptoms had progressively worsened. Mr. Moss reported increased pain, swelling, and weakness, as well as reduced activities of daily living due to his symptoms. Dr. Guberman diagnosed chronic posttraumatic right shoulder strain and contusion. After examination, Dr. Guberman assessed 7% impairment. He did not apportion for preexisting impairment. Based on Dr. Guberman's evaluation, Mr. Moss filed a petition to reopen the claim for permanent partial disability benefits, which the claims administrator denied. Dr. Mukkamala performed an independent medical evaluation on September 7, 2021, in which he found that Mr. Moss had 1% whole person impairment for the right shoulder injury after apportionment.

The Office of Judges affirmed the claims administrator's denial of Mr. Moss's request to reopen the claim for permanent partial disability benefits. It found that Mr. Moss's request was based on Dr. Guberman's finding of an additional 3% permanent partial disability. Dr. Guberman did not apportion for preexisting degenerative changes when he assessed 7% right shoulder impairment. The Office of Judges found that it is the law of the case that Mr. Moss has preexisting right shoulder impairment. It therefore concluded that Dr. Guberman's June 9, 2021, finding of 7% impairment, without apportionment, is not a reliable indicator of whether Mr. Moss's impairment has progressed due to the compensable injury. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its decision on April 21, 2022.

On appeal, petitioner asserts two assignments of error. First, that the Board of Review was clearly wrong to affirm the decision of the Office of Judges, and second, that the Board of Review was clearly wrong to find that Mr. Moss did not prove by a preponderance of the evidence that further adjustment to his permanent partial disability award is justified by the medical evidence.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. In order to reopen a claim for permanent partial disability benefits, West Virginia Code § 23-5-3 requires that a claimant make an application in writing showing a progression or aggravation of the compensable condition or some other fact or facts which were not considered previously that would entitle him to greater benefits than he has already received. Mr. Moss has not met this burden of proof. He sought reopening of his claim based on Dr. Guberman's finding of 7% right shoulder permanent partial disability. However, Dr. Guberman's most recent report failed to acknowledge or account for the preexisting impairment that he apportioned for in his first evaluation when he found only 4% impairment attributable to

the compensable injury. We agree with the Office of Judges and Board of Review that Mr. Moss has been fully compensated by his prior 4% permanent partial disability award.

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