

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Shelley Rowe,
Claimant Below, Petitioner

vs.) **No. 22-593** (BOR Appeal No. 2057971)
(JCN: 2019025577)

AAA East Central, Inc.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Shelley Rowe appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent AAA East Central, Inc. filed a timely response.¹ The issue on appeal is entitlement to permanent partial disability. The claims administrator granted petitioner 0% permanent partial disability on October 5, 2020. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the claims administrator's decision in its March 3, 2022, order. The order was affirmed by the Board of Review on June 22, 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.

On June 6, 2019, while exiting the door at her employment, petitioner fell and fractured her right ankle. On June 12, 2019, Joseph Fazalare, M.D., performed an open reduction internal fixation on the right ankle. The claims administrator held the claim compensable for a broken right ankle on June 14, 2019.

Petitioner was seen by Joseph E. Grady, II, M.D., for an independent medical evaluation on September 21, 2020. Dr. Grady noted that the right ankle was covered under the claim. Petitioner used a cane, "but she was able to ambulate without it." Petitioner had a slight limp. Dr. Grady found that petitioner reached maximum medical improvement but had some residual arthralgia (joint stiffness) attributable to the compensable injury. However, petitioner had the same range of motion in the right ankle as she had in the uninjured left ankle: 20 degrees of extension, 40 degrees of plantar flexion, 40 degrees of inversion, and 30 degrees of eversion in both of the ankles. Similarly, no loss in the range of motion occurred in the toes of the right foot. Therefore, Dr. Grady determined that petitioner had no impairment for range of motion limitations based on tables 42, 43, and 45 on page 78 of the American Medical Association's *Guides to the Evaluation*

¹Petitioner is represented by Reginald D. Henry, and respondent is represented by Maureen Kowalski.

of *Permanent Impairment* (4th ed. 1993) (“*AMA Guides*”). In addition, petitioner demonstrated no instability or atrophy in the right ankle. Thus, Dr. Grady determined that petitioner had no impairment based on table 64 on pages 85 and 86 of the *AMA Guides*. Accordingly, Dr. Grady concluded that the compensable injury produced 0% impairment under the *AMA Guides*. Due to Dr. Grady’s report, the claims administrator granted petitioner 0% permanent partial disability on October 5, 2020. Petitioner protested this decision.

Petitioner testified at a deposition on December 9, 2020. Petitioner stated that following the instant injury, she returned to her job on a part-time basis on October 17, 2019. Petitioner resumed full-time work in January 2020. Petitioner testified that while her supervisor tries to give her breaks where she can stand up and move around every two hours, sitting in one place for an extended period causes her right leg to throb and swell. Petitioner stated that she could no longer walk outside or hike due to a lack of balance. Petitioner testified that she could not shop for Christmas because, after twenty minutes of walking, she felt excruciating pain in her right leg. Petitioner explained that, when she walked, the pain is like petitioner can feel “the plate on my bone.” Petitioner also stated that she has been unable to ride a bicycle since the instant injury. Petitioner depends on her twenty-year-old son to help with the household chores like washing clothes, washing the dishes, and grocery shopping. Petitioner testified that she has pain by the evening of each day, and her right leg is swollen; she no longer takes long showers due to the pain she feels after fifteen minutes; she has difficulty walking up and down steps; and she is unable to wear high heel shoes or regular flat shoes.

Petitioner was seen by Robert B. Walker, M.D., for an independent medical evaluation on June 18, 2021. Dr. Walker evaluated petitioner for a right ankle fracture. Dr. Walker found differences in the range of motion in petitioner’s ankles. The right ankle extended to 5 degrees and flexed to 10 degrees, while the right hindfoot inverted to 8 degrees and everted to 3 degrees. In contrast, the uninjured left ankle extended to 15 degrees and flexed to 20 degrees, and the left hindfoot inverted to 18 degrees and everted to 8 degrees. Therefore, Dr. Walker found impairment in the right ankle and impairment in the right hindfoot based upon tables 42 and 43 on page 78 of the *AMA Guides*. Petitioner also had persistent swelling of the distal right extremity despite her use of wraps and support hose. Dr. Walker attributed this swelling to venous and lymphatic disruption due to the compensable injury and the resulting surgery and placement of hardware in the right ankle. Thus, Dr. Walker determined that petitioner had impairment based on table 69 on page 89 of the *AMA Guides*. Dr. Walker noted that table 69 measures impairment caused by peripheral vascular disease. Dr. Walker combined the impairment for the restricted motion and the impairment for the persistent swelling to produce an overall rating of 11% whole person impairment.

In its March 3, 2022, order, the Office of Judges affirmed the claims administrator’s decision granting petitioner 0% permanent partial disability. The Office of Judges found that in giving petitioner impairment based on table 69 on page 89 of the *AMA Guides*, Dr. Walker rated her for peripheral vascular disease. The claim did not include peripheral vascular disease as a compensable condition. Thus, the Office of Judges determined that Dr. Grady’s report, in which Dr. Grady provided an impairment rating under the *AMA Guides* for the compensable ankle injury, constituted the most persuasive report. Therefore, the Office of Judges concluded that petitioner

failed to show that the claims administrator erred in granting her 0% permanent partial disability. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed the order on June 22, 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).

“Pursuant to W. Va. Code § 23-4-1g(a) (2003) (Repl. Vol. 2010), a claimant in a workers' compensation case must prove his or her claim for benefits by a preponderance of the evidence.” Syl. Pt. 2, *Gill v. City of Charleston*, 236 W. Va. 737, 783 S.E.2d 857 (2016). In addition, West Virginia Code § 23-4-6(i) generally provides permanent partial disability is determined “by the degree of whole body medical impairment[.]” West Virginia Code of State Rules § 85-20-65.1 (2006) generally directs that the *AMA Guides* be utilized in the calculation of whole person impairment.

After review, we find no error in the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Petitioner argues that Dr. Walker's utilization of table 69 on page 89 of the *AMA Guides* was proper given that the ankle swelling is not controlled by her use of wraps or support hose. Under table 69, edema (swelling) constitutes an indicator of impairment. However, Section 3.2m of the *AMA Guides* plainly states that table 69 “classifies and provides criteria for impairments due to *peripheral vascular disease* of the lower extremity.” (Emphasis added.) Dr. Walker did not diagnose petitioner with peripheral vascular disease, and it is not a compensable component of the instant claim. Therefore, by rating petitioner on table 69, Dr. Walker misapplied the *AMA Guides*. While Dr. Walker based another component of his impairment rating on range of motion measurements, utilizing select findings rather than Dr. Walker's report as a whole to determine petitioner's impairment would be contrary to the requirement that permanent partial disability awards are made solely on the basis of the doctor's impairment evaluation pursuant to *Repass v. Workers' Compensation Division*, 212 W. Va. 86, 95, 569 S.E.2d 162, 171 (2002). *See Baria v. Cap. Beverage Co.*, No. 15-0056, 2015 WL 5883444, at *3 (W. Va. Oct. 7, 2015) (memorandum decision).

Petitioner further argues that even if Dr. Walker's report did not properly apply the *AMA Guides*, Dr. Grady's rating of 0% impairment is also flawed as her severe ankle fracture required the installation of hardware. However, Dr. Grady's findings, including his range of motion measurements for both of petitioner's ankles, are in the record. Nothing suggests that Dr. Grady ignored the medical evidence or misapplied the *AMA Guides*. Accordingly, we find that the Office of Judges did not err in determining that petitioner failed to show that the claims administrator erred in granting her 0% permanent partial disability.

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