

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**Jackson County Board of Education,  
Employer Below, Petitioner**

vs.) **No. 22-0031** (BOR Appeal No. 2057091)  
(JCN: 2017011435)

**Karen White-Ross,  
Claimant Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Jackson County Board of Education appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent Karen White-Ross filed a timely response.<sup>1</sup> The issue on appeal is the claim administrator's denial of a permanent total disability award ("PTD"), which was reversed by the Workers' Compensation Office of Judges ("Office of Judges") on July 13, 2021, upon finding that Ms. White-Ross has at least a 50% whole person impairment warranting remand for consideration on the merits of her entitlement to a permanent total disability award. The claim was remanded to the claim administrator for a review on the merits of the PTD application. On December 17, 2021, the Board of Review affirmed the decision of the Office of Judges. 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.*

Ms. White-Ross completed an Employees' and Physicians' Report of Occupational Injury or Occupational Disease form on October 21, 2016, alleging an injury to her shoulder and arm when an autistic student grabbed her. The physician's portion of the form was completed at Roane General Hospital, and the injury listed was a rotator cuff injury. The assessment was right shoulder injury, right rhomboid muscle strain, and right latissimus dorsi muscle strain. A right shoulder MRI without contrast was taken at Roane Hospital on November 9, 2016, and revealed mild degenerative changes of the right shoulder. The long head of the biceps tendon was unremarkable. There were cystic degenerative changes involving the greater tubercle and degenerative changes in the acromioclavicular joint. Ms. White-Ross underwent arthroscopy of the right shoulder with debridement of the rotator cuff, and subacromial decompression and partial acromioplasty. The postoperative diagnoses were impingement syndrome of the right shoulder and partial-thickness rotator cuff tear of the right shoulder.

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<sup>1</sup> The petitioner, Jackson County Board of Education, is represented by counsel Lisa Warner Hunter. The respondent, Karen White-Ross, is represented by counsel Reginald D. Henry.

David Soulsby, M.D., an orthopedic surgeon, issued an independent medical evaluation report dated May 2, 2019, and indicated that Ms. White-Ross had a partial thickness tear of the right rotator cuff, status post acromioplasty, and impingement syndrome of the right shoulder. Range of motion was listed as irritable, and impingement sign was positive. Dr. Soulsby stated that the pre-existing injury was aggravated by the injury from October 2016 in this claim. Ms. White-Ross was found to be at maximum medical improvement. Dr. Soulsby rated impairment at 10% for right upper extremity impairment, which converts to 6% whole person impairment. He apportioned half of the impairment to the noncompensable conditions, noting that there had been significant deterioration in her range of motion. Dr. Soulsby recommended 3% whole person impairment for the October 21, 2016, injury.

Ms. White-Ross completed and filed a PTD application on January 29, 2020, as required by West Virginia Code § 23-4-6(n)(1).<sup>2</sup> The record reflects that she suffered numerous workers' compensation injuries over the years from 2003 to 2016. The PTD summary indicated the following awards, totaling 62% permanent partial disability ("PPD"): (1) 6% PPD for a left knee injury in claim no. 2003051348; (2) 3% PPD for a left knee injury in claim no. 2006040989; (3) 8% PPD for a cervical injury and 5% for a lumbar injury in claim no. 2010006548; (4) 3% PPD for leg burns in claim no. 2012000721; (5) 1% PPD for lumbar, cervical, and left shoulder injuries in claim no. YKT01940C; (6) 33% PPD for a right eye injury in claim no. YKT07254C<sup>3</sup>; and (7) 3% PPD for a right shoulder injury in claim no. E7T3785. The PTD application included attachments of the independent medical evaluation reports from the physicians in each claim, as well as the claim orders and decisions granting PPD awards.

Following the submission of the PTD application, Ms. White-Ross was evaluated by Syam Stoll, M.D., who issued an independent medical evaluation report on June 16, 2020. Dr. Stoll disagreed with the assessments of Luis Loimil, M.D.; Paul Bachwitt, M.D.; and Prasadarao Mukkamala, M.D., who previously submitted impairment ratings. Dr. Stoll disagreed with the prior evaluators because they did not apportion their ratings for degenerative conditions. Instead, each physician evaluated Ms. White-Ross for her individual injuries at the time she had reached maximum medical improvement for the particular injury.

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<sup>2</sup> Pursuant to West Virginia Code § 23-4-6(n)(1), a claimant must first meet the eligibility threshold by demonstrating that he or she has been awarded the sum of 50%, or 35% in statutory disability. Most often the eligibility threshold is determined by simply adding the claimant's prior permanent partial disability awards. Once the eligibility threshold has been satisfied, the claimant will be reevaluated for a determination as to whether he or she meets the whole person medical impairment threshold by being assessed with at least 50% whole person impairment from all compensable injuries/diseases, or a 35% statutory award. *Id.*

<sup>3</sup> Michael Krasnow, D.O., Ph.D., evaluated Ms. White-Ross on March 21, 2013, and found sufficient medical documentation to support a causal relationship between a right eye injury in the course of her employment. Dr. Krasnow rated Ms. White-Ross's eye impairment to be at 100%, and on July 21, 2014, she was granted a 33% PPD award pursuant to West Virginia Code § 23-4-6(f).

Dr. Stoll noted that Ms. White-Ross was awarded 6% PPD for her left knee injury on November 19, 2003, and she received an additional 3% award based upon a report of Dr. Loimil. Dr. Stoll felt that the additional 3% impairment was inappropriate because Dr. Loimil failed to apportion for preexisting disease. For the cervical spine, Dr. Stoll noted that Ms. White-Ross received 8% PPD based on a report of Dr. Bachwitt, who found no significant arthritic changes in the claim. However, Dr. Stoll opined that apportionment for preexisting disease was indicated. Likewise, Dr. Stoll stated that Dr. Mukkamala failed to apportion for preexisting disease when he evaluated Ms. White-Ross and found 9% whole person impairment for her left shoulder and neck injuries. Regarding Ms. White-Ross's right eye injury, Dr. Stoll recommended an evaluation by an ophthalmologist to assess impairment because there were inconsistencies in the record concerning vision loss in the right eye.

After his evaluation, Dr. Stoll found 4% from Table 75 II under the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993) ("AMA Guides") for the cervical spine, and 7% for loss of range of motion for a total of 11% impairment. He referred to W. Va. Code R. § 85-20 and placed Ms. White-Ross in Cervical Category II of Table 85-20-D for 8% impairment. Dr. Stoll then noted that the imaging revealed preexisting degenerative conditions, and he apportioned 3% impairment yielding 5% impairment for the cervical spine as a result of her injuries in the claims. For the lumbar spine, Dr. Stoll found a total of 7% impairment and apportioned 2% for preexisting degenerative changes, for a total of 5% whole person impairment. Dr. Stoll found that Ms. White-Ross did not qualify for an impairment rating for atrophy, gait derangement, or other conditions for the left knee.

For the right shoulder, Dr. Stoll apportioned 1% for preexisting degenerative joint disease, and he recommended 2% impairment. For the left shoulder, Dr. Stoll found 2% whole person impairment for range of motion deficits; however, he apportioned 1% for preexisting disease based upon an x-ray dated July 30, 2012. As a result, 1% whole person impairment was recommended for the left shoulder injury. Dr. Stoll reviewed Ms. White-Ross's rating for chemical burns that she sustained on June 30, 2011, and he recommended 2% impairment due to mild pigmentation changes of the skin. Excluding right eye impairment, Dr. Stoll found that Ms. White-Ross had a total of 15% whole person impairment for her injuries.

On June 23, 2020, Ghassan Y. Dagher, M.D., prepared a comprehensive ophthalmological report determining that Ms. White-Ross had suffered a retinal hemorrhage and retinal edema that obscured part of the optic nerve. The injury resulted in a narrowing of a branch of the central retinal artery, and her accident caused her loss of vision. Although she retained quadrants of useful peripheral vision, she lost 94% vision in her right eye. Using the AMA *Guides*, Dr. Dagher found 23% whole person impairment. Dr. Dagher noted that he did not believe W. Va. Code R. § 85-20 would allow for 33% whole person impairment applied in this case because Ms. White-Ross had a normal reactive pupil to light, some depth perception, and a tolerable loss of vision in the peripheral field.

On October 15, 2020, the claim administrator issued an order denying Ms. White-Ross's PTD application, stating that Dr. Stoll assessed 15% whole person impairment, and when combined with Dr. Dagher's 23% whole person impairment, the amount of impairment did not

meet the second 50% threshold required for PTD consideration under West Virginia Code § 23-4-6(n)(1). Ms. White-Ross protested the claim administrator's decision.

Bruce Guberman, M.D., evaluated Ms. White-Ross on December 14, 2020, for her workers' compensation claims. He found a total of 27% impairment for the orthopedic injuries/conditions and skin disorders. Dr. Guberman suggested 5% for the right shoulder; 2% for a skin disorder; 8% for the lumbar spine; 8% for the cervical spine; and 4% for the left knee. Although Dr. Guberman acknowledged Ms. White-Ross's 33% award for her eye injury, he did not attempt to provide an impairment rating for the eye. The combined whole person impairment for all injuries was 51% whole person impairment.

Dr. Stoll issued a February 8, 2021, addendum report after reviewing the reports of Dr. Dagher and Dr. Guberman. He agreed with Dr. Dagher's findings of 23% impairment for the eye injury, and he stated that the prior 33% impairment was inappropriate and incorrect. Dr. Stoll found multiple issues with Dr. Guberman's findings related to the orthopedic injuries, and he concluded that Dr. Guberman's finding of 51% whole person impairment was inflated and an inappropriate rating for the multiple soft tissue injuries Ms. White-Ross sustained from 2003 through 2016. Dr. Stoll restated his prior finding of 15% whole person impairment for the orthopedic injuries in the claim.

In a final decision dated July 13, 2021, the Office of Judges reversed the claim administrator's October 15, 2020, order finding that Ms. White-Ross did not meet the threshold of 50% whole person impairment for consideration of a PTD award. The claim was remanded with instructions to consider Ms. White-Ross's PTD application on the merits. The Office of Judges noted that Dr. Stoll's ratings were considerably less than the other evaluators due to significant apportionment. Dr. Stoll's argument that impairments should have been apportioned when they were assessed years ago was not found to be persuasive because Dr. Stoll failed to provide a basis that existed at the time of the initial evaluations to support apportionment. Dr. Guberman's findings were adopted by the Office of Judges, as well as Dr. Krasnow's finding of 33% impairment for the eye injury in the claim. The employer filed an appeal, and on December 17, 2021, the Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed the July 13, 2021, final decision.

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 effectively represents a reversal of a prior ruling of either the Workers' Compensation Commission or 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 so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. *See* W. Va. Code § 23-5-15(c) & (e). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. of Ins. Comm'n*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

The issue on appeal is whether Ms. White-Ross meets the second threshold for further consideration of a PTD award under West Virginia Code § 23-4-6(n), which requires a whole body medical impairment of “50% or greater.” The employer argues that Ms. White-Ross did not establish that she met the second statutory threshold. Relying upon Dr. Stoll’s assessment of 15% whole person impairment and Dr. Dagher’s finding of 23% whole person impairment for the eye injury, the employer asserts that the combined amount of impairment in the claim is less than the required statutory threshold. As a result, the employer argues that Ms. White-Ross is not entitled to further consideration for a PTD award.

After review, we agree with the reasoning and conclusions of the Office of Judges, as affirmed by the Board of Review. The appeal rests upon a choice between the assessments of Dr. Stoll and Dr. Guberman. In all, Dr. Stoll found 15% whole person impairment for Ms. White-Ross’s orthopedic injuries, which is considerably less than the impairment found by physicians in the claim. After his review, Dr. Guberman opined 27% whole person impairment. The Office of Judges determined that Dr. Stoll’s argument that the impairment ratings of the other physicians in the claim should have been apportioned, when they were assessed years before, was not persuasive because he failed to provide a basis that existed at the time to support his conclusion. Instead, the Office of Judges reasoned that the evaluators evaluated Ms. White-Ross for her individual injuries at the time she reached maximum medical improvement.

In regard to the right eye injury, the Office of Judges determined that a difference of medical opinion exists between the eye physicians who evaluated Ms. White-Ross. In 2014, Dr. Krasnow opined that Ms. White-Ross qualified for a statutory 33% award because it was found that she had a 100% loss of vision in her right eye. When Dr. Dagher examined Ms. White-Ross in 2020, he explained that she did not suffer complete vision loss in her right eye. As a result, Dr. Dagher opined that the condition could be properly rated using the *AMA Guides*, and he opined 23% whole person impairment. The Office of Judges did not find that the difference of medical opinion between Dr. Krasnow and Dr. Dagher was “enough to find that one report is worthy of more evidentiary weight than the other.” Citing West Virginia Code § 23-4-1g,<sup>4</sup> the Office of Judges adopted the report of Dr. Krasnow, and found that Ms. White-Ross had 33% impairment for her right eye.

After accepting the 27% whole person impairment recommendation by Dr. Guberman, as well as Dr. Krasnow’s 33% statutory impairment rating for the right eye injury, the Office of Judges found that Ms. White-Ross had proven by a preponderance of the evidence that her request for a permanent total disability award should advance to a review on the merits because she met the second statutory threshold for permanent total disability consideration. Consequently, we find no error in the Board of Review’s order affirming the Office of Judges.

For the foregoing reasons, we affirm.

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<sup>4</sup> West Virginia Code § 23-4-1g provides that when an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant’s position will be adopted.

Affirmed.

**ISSUED: April 30, 2024**

**CONCURRED IN BY:**

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