

No. 21-0822



IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

WV DEPARTMENT OF HEALTH AND
HUMAN RESOURCES,

Petitioner,

vs.

DEBORAH S. SMITH,

Respondent.

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APPEAL NO. 2056601
CLAIM NO 2240307660001
JCN NO. 2017017383

Respondent's Brief

RESPONDENT'S BRIEF FILED ON BEHALF OF THE CLAIMANT
FROM A FINAL DECISION OF THE WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF REVIEW

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TABLE OF AUTHORITIES

1. Three elements must coexist in compensability cases: (1) a personal injury; (2) received in the course of employment; and (3) resulting from that employment. Barnett v. State Workmen's Compensation Commissioner, 153 WV 976, 172 S.E. 2d 698 (1970); Jordan v. State Workmen's Compensation Commissioner, 156 W.Va. 159, 191 S.E.2d 497 (1972).
2. The resolution of the instant issue requires a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. West Virginia Code § 23-4-1g.
3. The Board of Review shall reverse, vacate or modify the order or decision of the ALJ if the substantial rights of the petitioner or petitioners have been prejudiced because the ALJ's findings violate any one or more of six specifically prescribed provisions. West Virginia Code § 23-5-12(b).
4. W. Va. Code § 23-4-9b provides, "Where an employee has a definitely ascertainable impairment resulting from an occupational or a non-occupational injury, disease, or any other cause, whether or not disabling, and the employee thereafter sustains an injury in the course of and resulting from his or her employment, unless the subsequent injury results in total permanent disability...the prior injury, and the effect of the prior injury, and an aggravation, shall not be taken into consideration in fixing the amount of compensation allowed by reason of the subsequent injury. . . ."
5. For injuries occurring after May 12, 1995, permanent partial disability awards are based on medical impairment. The Commissioner has adopted the AMA Guides, 4th Ed., as the measure of whole body medical impairment. West Virginia Code § 23-4-6 and 85 CSR 20. In cases where the examination upon which the award was based was conducted on or after June 14, 2004, range of impairment limitations, as set forth in 85 CSR 20, apply to some types of injuries.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS:

The Respondent, Deborah S. Smith, respectfully represents that this is his Response to Employer's Petition For Appeal from the final decision of the Worker's Compensation Board of Review dated September 17, 2021, which affirmed the Office of Judge's decision dated March 26, 2021, which reversed the Claims Administrator's order of January 21, 2020, granting a 21% PPD award. The OOJ decision then granted a 30% PPD award.

INTRODUCTORY NOTE

The Respondent, Deborah S. Smith, will be referred to as Claimant; the Workers' Compensation Board of Review will be referred to as BOR; the Office of Judges will be referred to as OOJ; the Administrative Law Judge will be referred to as ALJ; the third-party administrator will be referred to as CA; WV Department of Health and Human Resources will be referred to as Employer; the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition will be referred to as AMA Guides, 4th Ed.; maximum medical improvement will be referred to as MMI; permanent partial disability will be referred to as PPD; and temporary total disability will be referred to as TTD.

STATEMENT OF THE CASE

An Employee Incident Report dated December 13, 2016, lists the mechanism of the Claimant's injury:

Entered 1st security door (side door) on Pike Street. Tripped over rug in the area between outside door and door to enter the main building. Tripped falling forward trying to catch myself causing my head, hands, entire body to fall forward

hitting door/wall and wheelchair in corner of foyer.
The injury was stated to have occurred at approximately 7:15 AM on August 30, 2016.

[Exhibit 1]

An Employees' and Physicians' Report of Occupational Injury or Disease dated January 10, 2017, listed the Claimant's injuries as "cervical strain and radiculopathy."

[Exhibit 2]

The Claimant was evaluated in the Emergency Department of Williamson Memorial Hospital on January 10, 2017. She complained of pain in her thoracic and cervical spine, as well as the right forearm, wrist, and hand. The diagnoses were cervical radiculopathy and cervical sprain. **[Exhibit 3]**

By order dated January 30, 2017, the claim was approved for cervical strain. The Claimant was not awarded TTD benefits. **[Exhibit 4]**

An MRI of the cervical spine dated September 11, 2017, revealed multilevel degenerative disk disease, most pronounced at C5-6 where there is a disk osteophyte complex eccentric to the left with resultant spinal canal and neuroforaminal stenosis. There was also noted to be a syrinx within the thoracic spinal cord which was incompletely evaluated. **[Exhibit 5]**

On October 17, 2017, the Claimant underwent a medical evaluation with Dr. Bruce Guberman. He opined that he could not determine an overall prognosis at the time of the evaluation, because he felt that the Claimant may show improvement with treatment, including physical therapy and chiropractic treatment. After reviewing the Claimant's medical record and performing a physical examination, Dr. Guberman

concluded that the Claimant's complaints were related to the original work injury. He did not place the Claimant at MMI. **[Exhibit 6]**

A lumbar spine MRI dated November 18, 2017, showed mild degenerative changes, including mild disk bulge at L4-5 and disk bulge with small central disk herniation at L5-S1. **[Exhibit 7]** An MRI of the thoracic spine obtained on the same day showed a small T2 high signal lesion in the central aspect of the thoracic cord which was incompletely characterized without IV contrast. **[Exhibit 8]**

An MRI of the thoracic spine with contrast dated January 19, 2018, revealed a thoracic cord syrinx. **[Exhibit 9]**

The Claimant underwent motor nerve, sensory nerve, F-wave, EMG, and 4-channel evoked potential testing of the upper extremities on April 10, 2018. The study results were abnormal, with electrodiagnostic evidence of bilateral carpal tunnel syndrome. **[Exhibit 10]**

On July 5, 2018, the Claimant underwent an initial orthopedic evaluation with Dr. Luis Bolano. His assessment included carpal tunnel syndrome of the left and right wrists. **[Exhibit 11]**

The Claimant underwent a medical evaluation with Dr. Constantino Amores on August 15, 2018. Dr. Amores opined that the Claimant's injuries were causally related to her workplace accident. He did not place the Claimant at MMI. **[Exhibit 12]**

A cervical spine MRI dated March 22, 2019, showed degenerative disk and joint disease with mild left foraminal stenosis at C5-C6. An MRI of the thoracic spine

obtained on the same date revealed stable thoracic spinal cord syrinx and degenerative disk disease without evidence of stenosis. **[Exhibit 13]**

The Claimant underwent a psychiatric evaluation at Appalachian Psychological Associates on April 9, 2019. Robin Browning, MA, suggested that the Claimant would benefit from psychotherapy. **[Exhibit 14]**

On July 19, 2019, the Claimant underwent a medical evaluation with Dr. Joseph Grady. He did not place the Claimant at MMI, and suggested she participate in physical therapy for her neck and back injuries. **[Exhibit 15]**

On January 7, 2020, the Claimant underwent an additional medical evaluation with Dr. Paul Bachwitt. Dr. Bachwitt recommended a 21% whole person impairment rating for the Claimant's injuries. **[Exhibit 16]**

By order dated January 21, 2020, the CA granted the Claimant a 21% PPD award. The Claimant protested. **[Exhibit 17]**

The Claimant underwent a medical evaluation with Dr. Bruce Guberman on June 22, 2020. Dr. Guberman recommended a 30% whole person impairment rating. **[Exhibit 18]**

On February 4, 2021, the Claimant underwent a psychological evaluation with Rosemary Smith, a licensed psychologist. She concluded that the Claimant was showing a marked amount of emotional distress, with apparent personality dysfunction. She also noted the presence of depression, anxiety, restlessness, somatization, and possible suicidal ideation. **[Exhibit 19]**

The Claimant underwent a psychiatric evaluation with Dr. Timothy Thistlethwaite on February 8, 2021. He placed the Claimant at MMI for her psychiatric conditions, and rated her at a 10% whole person impairment for the same. **[Exhibit 20]**

By decision dated March 26, 2021, the OOJ reversed the CA order of January 21, 2020, and granted a total of 30% PPD benefits. The Employer appealed. **[Exhibit 21]**

In a decision dated September 17, 2021, the BOR upheld the OOJ decision of March 26, 2021. The Employer then submitted a petition in the instant matter. **[Exhibit 22]**

SUMMARY OF ARGUMENT

The record reflects that the 30% PPD award calculated by Dr. Guberman is the more accurate rating, because the evidence shows that the Claimant suffered no symptoms and sought no medical treatment for the alleged pre-existing conditions prior to the compensable workplace injury. Thus, the BOR was correct in upholding the OOJ's decision pursuant to West Virginia Code § 23-5-12(b).

ARGUMENT

It is the Claimant's position that the ALJ's decision is well-reasoned and should be affirmed because a preponderance of the evidence of record establishes that Claimant sustained more than 21% PPD from her compensable injury. First, one of two

evaluators found more than a combined 21% total for Claimant's neck, back, and wrist injuries. Dr. Guberman did not apportion any rating to a pre-existing impairment, which is supported by the record that Claimant had no symptoms or medical treatment to those areas of her body at any time prior to the injury on August 30, 2016, proving she had no ascertainable impairment prior to the injury.

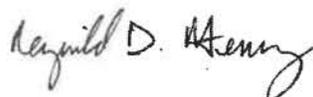
The ALJ decision found that Dr. Guberman's report was based upon a proper application of the AMA Guides and Rule 20, and his findings were supported by and consistent with the bulk of the evidence in this matter. The ALJ further noted that it is inappropriate for Dr. Bachwitt to apportion 50% of the Claimant's whole person impairment due to only mild degenerative changes.

The ALJ's decision is neither violative of any statute or regulation, nor the result of clearly erroneous law. Therefore, there was no basis under West Virginia Code § 23-5-12(b) for the BOR to reverse the ALJ's ruling of March 26, 2021. Accordingly, the BOR decision dated September 17, 2021 must stand, as Employer has failed to show that the BOR's decision is clearly and plainly wrong pursuant to Conley v. Workers' Comp. Div., 199 W.Va. 196, 199, 483 S.E.2d 542, 545 (1997).

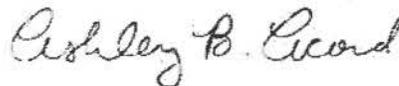
PRAYER

WHEREFORE, based upon the foregoing, the Respondent, Deborah S. Smith, respectfully requests that this Honorable Court **REFUSE** the Employer's Petition for Appeal, and **AFFIRM** the final decision from the Board of Review dated September 17, 2021.

Respectfully submitted,
Deborah S. Smith
By Counsel



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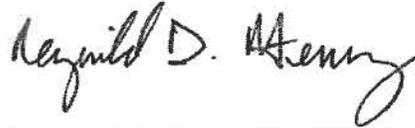
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CERTIFICATE OF SERVICE

I, Reginald D. Henry, counsel for the Claimant herein, do hereby certify that I served the foregoing Respondent's Brief by forwarding a true copy thereof by United States mail, postage prepaid, to the following:

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November 8, 2021



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