

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Gwendolyn Butler,
Claimant Below, Petitioner

v.) **No. 23-147** (JCN: 2012018230)
(ICA No. 22-ICA-134)

D & D Quality Care, Inc.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Gwendolyn Butler appeals the February 2, 2023, memorandum decision of the Intermediate Court of Appeals of West Virginia (“ICA”). *See Butler v. D & D Quality Care, Inc.*, No. 22-ICA-134, 2023 WL 1463939 (W. Va. Ct. App. Feb. 2, 2023) (memorandum decision). Respondent D & D Quality Care, Inc. filed a timely response.¹ The issue on appeal is whether the ICA erred in affirming the September 8, 2022, decision of the West Virginia Workers’ Compensation Board of Review, which affirmed the claim administrator’s February 2, 2021, decision granting the claimant an additional 22% permanent partial disability award and denied the petitioner’s motion for a second remand of the case.

The petitioner, a nurse’s aide, was working for the respondent in December 2012 when she sustained an injury to her left ankle while assisting a patient into a chair. The petitioner has had a total of eight operations due to the compensable injury. The Workers’ Compensation Office of Judges² previously remanded this case in July 2016 because a left ankle fusion surgery was authorized after the petitioner’s October 2015 independent medical evaluation with Victoria M. Langa, M.D., who found that the petitioner had an 8% impairment. When Vincent Thomas, M.D., later assessed the petitioner as having a 30% impairment in December 2020, she failed to inform Dr. Thomas of her eighth surgery, which occurred in February 2020. According to the operative report, Vincent J. Sammarco, M.D., attempted a revision arthrodesis, stating that, as the petitioner was adamantly opposed to amputation, he was “willing to give this one more try with an external

¹ The petitioner is represented by M. Jane Glauser, Esq., and the respondent is represented by Timothy E. Huffman, Esq. We note that the respondent’s brief was filed by Kristy L. Eiter, Esq. on April 13, 2023. On July 28, 2023, Mr. Huffman filed a notice of appearance replacing Ms. Eiter.

² The Legislature transferred the powers and duties of the Office of Judges to the reconstituted Board of Review in July 2022. *See* W. Va. Code § 23-5-8a(a).

fixator.”³ In October 2021, Dr. Sammarco requested a motorized wheelchair for the petitioner and noted that x-rays showed “a nonunion of the previously attempted hindfoot fusion.”

In Dr. Thomas’s May 2022 supplemental report, Dr. Thomas similarly found that the February 2020 surgery failed and the petitioner still suffered from the nonunion of a previously attempted fusion of the left ankle. Therefore, because the petitioner’s condition was not altered, Dr. Thomas did not revise his 30% impairment rating for the petitioner. In affirming the claim administrator’s decision granting an additional 22% permanent partial disability and denying the petitioner’s motion for a remand for a new and comprehensive independent medical evaluation, the Board of Review found that Dr. Thomas’s report was reliable. The ICA subsequently affirmed the Board of Review. *See Butler*, 2023 WL 1463939, at *3.

This Court reviews questions of law de novo, while we accord deference to the Board of Review’s findings of fact unless the findings are clearly wrong. Syl. Pt. 3, *Duff v. Kanawha Cnty. Comm’n*, No. 23-43, 2024 WL 1715166 (W. Va. Apr. 22, 2024). In *Conley v. Workers’ Compensation Division*, 199 W. Va. 196, 483 S.E.2d 542 (1997), we stated that the “clearly wrong” and “plainly wrong” standards of review apply to evidentiary findings to which deference is given if supported by substantial evidence. *Id.* at 199, 483 S.E.2d at 545.

The instant award of an additional 22% permanent partial disability resulted from the claim administrator deducting a prior award of an 8% permanent partial disability, based on Dr. Langa’s 2015 report, from Dr. Thomas’s 30% impairment rating. In seeking a second remand of this case, the petitioner argues that the Office of Judges’ July 2016 remand order vacated the 8% award from December 2015. Based on our review of the record, including the July 2016 remand order, the Office of Judges did not vacate the earlier award. In addition, neither Dr. Langa nor Dr. Thomas gave the petitioner more than a 30% impairment, which was the total of her two permanent partial disability awards. Therefore, we conclude that the Board of Review did not abuse its discretion in denying the petitioner’s motion for a second remand. *See Scarberry v. Securitas Security Services USA, Inc.*, No. 16-0057, 2016 WL 6962331, at *2 (W.Va. Nov. 29, 2016) (memorandum decision) (reviewing the denial of a motion for a remand for an abuse of discretion).

The petitioner argues that the 30% impairment rating she received from Dr. Thomas did not encompass all of her impairment. The petitioner argues that the ICA failed to consider the evidence that showed that her condition has deteriorated since the independent medical evaluation in December 2020, including Dr. Sammarco’s records. The petitioner argues that she now uses a wheelchair while she could ambulate with a cane and a crow boot at the time of her December 2020 evaluation with Dr. Thomas. However, Dr. Thomas found that the petitioner was at maximum medical improvement in December 2020. Also, the Board of Review knew of Dr. Sammarco’s October 2021 request for a motorized wheelchair when it found Dr. Thomas’s report reliable and affirmed the award of an additional 22% permanent partial disability. As Dr. Thomas provided a reason for not revising his impairment rating that finds support in Dr. Sammarco’s records (the claimant’s underlying condition did not change), we defer to the Board of Review’s

³ Dr. Sammarco removed the external fixator in May 2020 after it was no longer needed.

determination of the reliability of Dr. Thomas's impairment rating. Therefore, we conclude that the ICA properly affirmed the Board of Review.

Affirmed.

ISSUED: August 1, 2024

CONCURRED IN BY:

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