

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

October 7, 2015

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**DANIEL R. LESTER**  
**Claimant Below, Petitioner**

vs.) **No. 14-0149** (BOR Appeal No. 2048422)  
(Claim No. 2001051516)

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER**  
**Commissioner Below, Respondent**

**and**

**BAYLOR MINING, INC.,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Daniel R. Lester, by John C. Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. West Virginia Office of the Insurance Commissioner, by Anna L. Faulkner, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 23, 2014, in which the Board reversed and vacated the May 2, 2013, Order of the Workers' Compensation Office of Judges and denied Mr. Lester's request for a permanent total disability award. In its Order, the Office of Judges reversed the claims administrator's March 19, 2012, decision denying the application for a permanent total disability award finding Mr. Lester met the requisite 50% whole body medical impairment and remanding the case to the claims administrator for further consideration of a permanent total disability award. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these

reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Lester, a coal miner for Baylor Mining, Inc., was caught in a rock slide at work on April 27, 2001, which injured his head, neck, back, and right leg. Mr. Lester's claim was held compensable for the conditions of dorsal vertebra fracture of femur and fracture of the fibula. On February 25, 2003, Mr. Lester was seen by H. S. Ramesh, M.D., for an independent medical evaluation. Dr. Ramesh believed Mr. Lester was at his maximum degree of medical improvement in relation to his lower back injury. Dr. Ramesh recommended 11% whole person impairment in relation to his lower back. On April 4, 2003, the claims administrator granted Mr. Lester an 11% permanent partial disability award related to his lower back. On October 11, 2004, Mr. Lester was seen by M. Khalid Hasan, M.D., for a psychiatric evaluation. Dr. Hasan recommended 6% whole person impairment related to all of Mr. Lester's psychiatric conditions, past and present. On October 14, 2004, Dr. Ramesh performed another independent medical evaluation and determined that Mr. Lester was at his maximum degree of medical improvement for all of his medical conditions. Dr. Ramesh found 19% whole person impairment based upon the tibial and fibial fractures. Dr. Hasan then combined the 19% whole person impairment for the leg with the 11% whole person impairment for the lumbar spine for a total of 28% impairment. Dr. Hasan then subtracted the previously granted 11% permanent partial disability award and recommended an increase of 17% permanent partial disability. Based upon the reports of Dr. Ramesh and Dr. Hasan the claims administrator granted Mr. Lester an extra 17% permanent partial disability for his orthopedic impairment and 6% permanent partial disability for his psychiatric impairment.

On April 8, 2005, Mr. Lester was seen by Clifford Carlson, M.D., for an independent medical evaluation. Dr. Carlson concluded that Mr. Lester suffered 13% whole person impairment for his lumbosacral spine. Dr. Carlson further found that Mr. Lester had 10% lower extremity impairment for leg length discrepancy, 5% lower extremity impairment for range of motion of the right knee, 9% lower extremity impairment for range of motion abnormalities of the ankle, 10% whole person impairment for persistent edema, 25% lower extremity impairment for the femoral fracture, 12% lower extremity impairment for the tibia calcis angle, and 10% lower extremity impairment for leg atrophy. When combined, Dr. Carlson found 67% lower extremity impairment, which converted to 27% whole person impairment for the right lower extremity. Dr. Carlson combined the 13% whole person impairment for the lower back and the 27% whole person impairment for the right leg to find a total of 36% whole person impairment for the orthopedic injuries.

On October 20, 2005, the Office of Judges reversed the claims administrator's January 6, 2005, decision to grant 17% permanent partial disability and granted an extra 10% permanent partial disability for a total of 27% permanent partial disability. On January 27, 2011, Mr. Lester's Permanent Total Disability Independent Vocational Rehabilitation Report was issued. The report indicated that Mr. Lester could not find gainful employment at the sedentary level because of his lack of a general education diploma. On July 21, 2011, the Permanent Total Disability Review Board examined the case and determined that Mr. Lester did not suffer from medical impairment of at least 50% on a whole body basis and had not sustained a 35% or

greater statutory disability. Based upon the report of the Permanent Total Disability Review Board, the claims administrator denied Mr. Lester's application for permanent total disability benefits. Mr. Lester protested the decision.

The Office of Judges determined that Mr. Lester met the 50% whole person impairment threshold, which entitled Mr. Lester to have further consideration for permanent total disability benefits. Because Dr. Carlson's evaluation was more in depth and was done later in time than Dr. Ramesh's evaluation, the Office of Judges found that Dr. Carlson's report was a more reliable indicator of Mr. Lester's disability. In reaching the decision that Mr. Lester had over 50% whole body impairment, the Office of Judges found that because occupational pneumoconiosis and hearing loss are not based upon the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), that when calculating whole person impairment for permanent total disability purposes the Combined Values Charts should not be used. The Office of Judges then added the 9% whole person impairment for the hearing loss that was previously granted with the 6% whole person impairment for the psychiatric component and the 36% whole person impairment for the orthopedic component to reach a total of 51% whole person impairment.

The Board of Review reversed the Office of Judges' Order and found that Mr. Lester had not reached the 50% whole person impairment threshold because the 6% whole person impairment for the psychiatric component of the injury and the 9% whole person impairment for the hearing loss component of the injury had to be combined with the orthopedic impairment utilizing the Combined Values Chart of the American Medical Association's *Guides*. The Board of Review found that when using the Combined Values Chart the resulting disability is 45%, which is below the required 50% threshold. The Board of Review supported its interpretation with citations to this Court's decision in *Sears v. West Virginia Office of Insurance Commissioner*, No. 11-0189 (Nov. 16, 2012) (memorandum decision). In that case, the Permanent Total Disability Review Board determined that Mr. Sears failed to show that he suffered from medical impairment of at least 50%. The Office of Judges found that Mr. Sears's percentages of disability should be added, not combined utilizing the Combined Values Chart of the American Medical Association's *Guides*. The Board of Review reversed the Office of Judges' Order and held that the Combined Values Chart of the American Medical Association's *Guides* must be utilized when combining the various medical impairments for permanent total disability purposes. This Court affirmed the Board of Review's interpretation of the American Medical Association's *Guides*. As a result, the Board of Review's interpretation in this case is consistent with this Court's prior holdings and is correct.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

**ISSUED: October 7, 2015**

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Allen H. Loughry II

**DISSENTING:**

Justice Menis E. Ketchum