

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

**HERMAN S. BLANKENSHIP,**  
**Claimant Below, Petitioner**

**FILED**  
January 16, 2014  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

vs.) **No. 12-0642** (Board of Review Appeal No. 2046549)  
(Claim No. 2009082555)

**SPARTAN MINING COMPANY,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Herman S. Blankenship, by John H. Shumate Jr., his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Spartan Mining Company, by Sean Harter, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 25, 2012, in which the Board affirmed an October 27, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 4, 2010, decision denying Mr. Blankenship's request for an additional permanent partial 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. Blankenship was employed as a roof bolt operator for Spartan Mining Company. On March 6, 2009, Mr. Blankenship sustained an injury to his forearm and elbow while changing a shuttle car tire. His claim was held compensable for non-traumatic rupture of tendons of biceps, long head. The claims administrator granted Mr. Blankenship a 3% permanent partial disability award and denied his request for an additional permanent partial disability award.

Dr. Grady found that Mr. Blankenship had reached maximum medical improvement on November 16, 2009. Utilizing the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, (4th Edition, 1993), Dr. Grady recommended a 3% whole person

impairment for the injury. Dr. Chand performed an independent medical examination on June 10, 2010, and by utilizing the *AMA Guides*, rated Mr. Blankenship with an 8% whole person impairment. Mr. Blankenship's claim was reopened on the basis of Dr. Chand's June 10, 2010, report. Dr. Grady reexamined Mr. Blankenship and again recommended a 3% whole person impairment. On June 24, 2011, Dr. Mukkamala performed an independent medical examination and concluded that Mr. Blankenship had 3% whole person impairment as a result of his compensable injury.

The Office of Judges held that Mr. Blankenship was not entitled to any additional permanent partial disability award. Mr. Blankenship asserts that Dr. Chand's report is the most relevant, credible, material, and reliable medical evidence of record and entitles him to a total of 8% permanent partial disability award or an additional 5% over and above the 3% permanent partial disability award previously granted. Spartan Mining Company maintains that a preponderance of the evidence clearly supports the finding rendered below and that Mr. Blankenship has sustained a 3% impairment from the compensable injury. The Office of Judges concluded that Dr. Grady and Dr. Mukkamala based their impairment ratings on range of motion findings, but Dr. Chand based his impairment rating partly on loss of grip strength and partly on the stiffness component of Mr. Blankenship's left elbow.

The Office of Judges noted that the reliability of Dr. Chand's finding was challenged by the fact that when Mr. Blankenship was examined by Dr. Grady on July 27, 2010, and Dr. Mukkamala on June 24, 2011, the deterioration detected by Dr. Chand on June 10, 2010, did not appear to be present. The Office of Judges further noted that the *AMA Guides*, do not assign a large role to strength measurements. Yet, Dr. Chand rated Mr. Blankenship with a 10% impairment for upper extremity grip strength loss. Dr. Chand's findings of grip loss strength impairment were significantly higher than Dr. Mukkamala's findings. Dr. Chand based the bulk of his impairment rating upon grip strength test results and failed to explain how he arrived at a 4% upper extremity impairment which was also included in his rating. The Office of Judges noted that Dr. Chand disregarded that Mr. Blankenship's grip strength had been adversely affected by a prior injury to Mr. Blankenship's left hand. The Office of Judges concluded that a preponderance of the evidence shows that the consistent findings of Dr. Grady and Dr. Mukkamala are entitled to greater evidentiary weight than Dr. Chand's findings. The Office of Judges held that Mr. Blankenship was not entitled to any additional permanent partial disability award. The Board of Review reached the same reasoned conclusions in its decision of April 25, 2012. We agree with the reasoning and conclusions of the Board of Review.

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: January 16, 2014**

**CONCURRED IN BY:**

Chief Justice Robin J. Davis

Justice Menis E. Ketchum

Justice Allen H. Loughry II

**DISSENTING:**

Justice Margaret L. Workman

Justice Brent D. Benjamin, not participating