

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

March 18, 2014

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

**TOMI A. VANNOY,**  
**Claimant Below, Petitioner**

vs.) **No. 12-0837** (BOR Appeal No. 2046905)  
(Claim No. 2009075707)

**PRIMECARE MEDICAL OF WEST VIRGINIA, INC.,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Tomi A. Vannoy, by John Blair, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. PrimeCare Medical of West Virginia, Inc., by Gary Nickerson and James Heslep, its attorneys, filed a timely response.

This appeal arises from the Board of Review's Final Order dated June 25, 2012, in which the Board affirmed a January 24, 2012, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's September 10, 2010, decision granting Ms. Vannoy a 5% permanent partial disability award for the injury to her thoracic spine. 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.

Ms. Vannoy injured her thoracic spine on December 30, 2008, while attempting to move a thirty pound box. On May 25, 2010, the claims administrator held Ms. Vannoy's claim compensable for sprain/strain of the thoracic region and injury to other site of the trunk. Ms. Vannoy has undergone three independent medical evaluations to determine the amount of permanent impairment resulting from her compensable injuries. On August 25, 2010, Bruce Guberman, M.D., evaluated Ms. Vannoy and recommended a 5% permanent partial disability award. The claims administrator granted Ms. Vannoy a 5% permanent partial disability award

based on Dr. Guberman's impairment recommendation. On October 1, 2010, Victor Poletajev, D.C., evaluated Ms. Vannoy and recommended an 8% permanent partial disability award. On September 23, 2011, Prasadarao Mukkamala, M.D., evaluated Ms. Vannoy and also recommended a 5% permanent partial disability award.

In its Order affirming the September 10, 2010, claims administrator's decision, the Office of Judges held that the evidence of record demonstrates that Ms. Vannoy has 5% permanent partial disability as a result of her thoracic spine injury. Ms. Vannoy disputes this finding and asserts, per the opinion of Dr. Poletajev, that she is entitled to an 8% permanent partial disability award for the injuries to her thoracic spine.

The Office of Judges found that Dr. Poletajev's report cannot be considered a reliable indicator of the impairment resulting from Ms. Vannoy's December 30, 2008, injury because he included an impairment rating for pre-existing herniated thoracic discs, which are evidenced on an MRI performed nearly one year before Ms. Vannoy's date of injury. The Office of Judges noted that this cannot be reconciled with West Virginia Code § 23-4-9b (2003), which requires that pre-existing impairment be excluded when determining a claimant's whole person impairment resulting from a compensable injury. The Office of Judges found that the reports of Dr. Guberman and Dr. Mukkamala are identical in that neither included the pre-existing disc herniation in his impairment rating and both recommended a 5% permanent partial disability award, and therefore found their reports to be reliable. The Board of Review reached the same reasoned conclusions in its decision of June 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: March 18, 2014**

**CONCURRED IN BY:**

Chief Justice Robin J. Davis  
Justice Brent D. Benjamin  
Justice Margaret L. Workman  
Justice Menis E. Ketchum  
Justice Allen H. Loughry II