

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

PATRICK RYAN ADKINS,
Claimant Below, Petitioner

vs.) No. 21-0293 (BOR Appeal No. 2055894)
(Claim No. 2018003500)

CARL WALKER CONSTRUCTION, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Patrick Ryan Adkins, by counsel G. Patrick Jacobs, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Carl Walker Construction, Inc., by counsel Steven K. Wellman, filed a timely response.

On appeal, Mr. Adkins seeks an award of 16% permanent partial disability based upon the evaluation of Bruce A. Guberman, M.D. The claims administrator granted Mr. Adkins a 10% permanent partial disability award in an Order dated August 3, 2018. On October 23, 2020, the Workers' Compensation Office of Judges ("Office of Judges") affirmed the claims administrator's decision. This appeal arises from the Board of Review's Order dated March 18, 2021, in which the Board affirmed the Order of the Office of Judges.

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.

The standard of review applicable to this Court's consideration of workers' compensation appeals has been set out under W. Va. Code § 23-5-15, in relevant part, as follows:

(c) In reviewing a decision of the Board of Review, the Supreme Court of Appeals shall consider the record provided by the board and give deference to the board's findings, reasoning, and conclusions

(d) If the decision of the board represents an affirmation of a prior ruling by both the commission and the Office of Judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo reweighing of the evidentiary record

See Hammons v. W. Va. Off. of Ins. Comm'r, 235 W. Va. 577, 582-83, 775 S.E.2d 458, 463-64 (2015). As we previously recognized in *Justice v. West Virginia Office Insurance Commission*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012), we apply a de novo standard of review to questions of law arising in the context of decisions issued by the Board. *See also Davies v. W. Va. Off. of Ins. Comm'r*, 227 W. Va. 330, 334, 708 S.E.2d 524, 528 (2011).

Mr. Adkins sustained a compensable injury to his right shoulder, right hip, and right leg on July 26, 2017, when he fell through a roof that collapsed onto the level below. The allowed conditions of the claim were traumatic dislocation of the right shoulder with inferior glenohumeral ligament/capsule rupture, biceps tendon, and superior labrum anterior-posterior tear. Regarding the amount of whole person impairment due to the compensable injury, Mr. Adkins was evaluated by four physicians.

On July 24, 2018, Mr. Adkins was evaluated by Paul Bachwitt, M.D., and presented with pain in his right shoulder and bicep. In his Independent Medical Evaluation report dated July 26, 2018, Dr. Bachwitt found that he reached maximum medical improvement with 5% upper extremity impairment for range of motion in the right shoulder. Dr. Bachwitt also found 4% upper extremity impairment for motor deficits of the median nerve, 5% upper extremity impairment for motor deficits of the ulnar nerve, and 3% upper extremity impairment for sensory deficits of the median nerve. The 5% upper extremity impairment for motor loss combined with the 3% upper extremity impairment for sensory loss to equal 8% upper extremity impairment. The 4% upper extremity impairment for the right median nerve was combined with the 8% upper extremity impairment for the ulnar nerve for a total of 12% upper extremity impairment for the compensable brachial plexus injury. Dr. Bachwitt then combined the 12% upper extremity impairment with the 5% range of motion impairment under the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), and its Combined Values Chart, for a total of 16% upper extremity impairment. This was then converted to 10% whole-person impairment under Table 3 of the *Guides*. Based upon Dr. Bachwitt's report, the claims administrator granted a 10% permanent partial disability award in an Order dated August 3, 2018. Mr. Adkins protested the claims administrator's decision.

In support of his protest, Mr. Adkins submitted a report from Bruce A. Guberman, M.D., dated November 7, 2018, who diagnosed traumatic dislocation of the right shoulder with resultant Hills-Sachs impaction injury and displacement of the anterior inferior labral ligamentous complex following an injury occurring at work on July 26, 2017. Mr. Adkins was also found to have a brachial plexus injury, which was causing atrophy of the right forearm

compared to the left forearm. Dr. Guberman found that he had reached maximum medical improvement in regard to the injury of July 26, 2017, and recommended 9% upper extremity impairment for shoulder flexion, extension, adduction, internal rotation, and external rotation. In terms of brachial plexus impairment, Dr. Guberman found 6% sensory loss, along with 14% upper extremity impairment. The combined total impairment was 29%, which Dr. Guberman converted to 17% whole-person impairment. Dr. Guberman's examination revealed no range of motion abnormalities of the right hip.

Mr. Adkins underwent an Independent Medical Evaluation with Prasadarao B. Mukkamala, M.D., on October 16, 2019. Dr. Mukkamala diagnosed right shoulder anterior instability with inferior glenohumeral ligament/capsule rupture, biceps tendon superior labrum and anterior posterior lesion tear, status post arthroscopic Bankart repair with biceps tenotomy, and biceps tenodesis. Dr. Mukkamala concluded that Mr. Adkins reached his maximum degree of medical improvement with 2% upper extremity impairment for range of motion deficits and 13% combined impairment for motor and sensory deficits of the ulnar and median nerves. Dr. Mukkamala combined the amounts of impairment for a total of 15% impairment of the upper extremity. Dr. Mukkamala then converted Mr. Adkins's impairment under Table 3, page 20 of the *Guides*, for a total of 9% whole-person impairment. Because he previously received a 10% permanent partial disability award, Dr. Mukkamala stated that Mr. Adkins is fully compensated with no additional impairment. With relation to the Independent Medical Evaluation report submitted by Dr. Guberman on November 7, 2018, Dr. Mukkamala stated that he sharply disagrees with Dr. Guberman's findings, stating that "it is inconceivable why the claimant would have more advanced limitation of range of motion" during Dr. Guberman's evaluation that during other evaluations.

The final impairment rating in the claim was by Marsha Lee Bailey, M.D., who conducted an Independent Medical Evaluation on January 9, 2020. Dr. Bailey opined that Mr. Adkins has a diagnosis of a traumatic right shoulder anterior dislocation with instability due to complex glenohumeral ligament, labrum, and capsular ruptures. She noted that he also sustained a biceps tendon tear at the time of his work accident of July 26, 2017, and that the injury was complicated by a right brachial plexus injury that improved over time. Dr. Bailey concluded that no further treatment was necessary because Mr. Adkins reached his maximum medical improvement with 2% upper extremity impairment for range of motion deficits. For motor and sensory deficits of the ulnar and median nerve, Dr. Bailey found 4% upper extremity impairment. She then combined 4% upper extremity impairment for these deficits with 2% for range of motion deficits for a total rating of 6%, which she converted to 4% whole-person impairment under Table 3, page 20 of the *Guides*. Dr. Bailey also noted that Mr. Adkins had range of motion deficits of the uninjured and non-compensable left shoulder, so she apportioned 1% of the impairment to preexisting conditions, leaving a total of 3% whole-person impairment attributable to the compensable injury.

In a second report dated February 26, 2020, Dr. Guberman stated that Dr. Bailey failed to list the right brachial plexus injury as one of her diagnoses. Regarding Dr. Bailey's apportionment of 1% for preexisting right shoulder conditions, Dr. Guberman stated:

“In my opinion, there is no evidence the claimant would have had impairment in regard to his right shoulder before the current injury, and even if present, there was no way to objectively determine or even estimate what that impairment would have been before the current injury, and therefore, in my opinion, it is not appropriate to apportion for preexisting conditions as Dr. Bailey has done.”

Dr. Guberman responded to Dr. Bailey’s criticism of his use of the *Guides* in determining whole person impairment by stating that the Combined Values Chart instructs evaluators that “if three or more impairment values are to be combined, select any two and find their combined value as above. Then, use that value and a third value to locate combined value of all.” He maintained that his testing was accurate and reliable.

Dr. Bailey addressed Dr. Guberman’s application of the Combined Values Chart and his explanation in a Supplemental Report of February 26, 2020. Dr. Bailey stated that Dr. Guberman was incorrect in stating that she did not report a diagnosis of a brachial plexus injury, and she initially stated in her Independent Medical Evaluation report that the “compensable injury was complicated by a right brachial plexus injury, which has gradually and significantly improved over time.” Regarding her apportionment for preexisting right shoulder conditions, Dr. Bailey stated that an MRI performed on October 2, 2017, revealed mild osteoarthritis of the acromioclavicular joint, which is the result of the normal aging process and perhaps is accelerated by heavy weightlifting. It was Dr. Bailey’s opinion that her physical examination findings support apportionment of Mr. Adkins’s right shoulder impairment due to his preexisting conditions.

In a Decision dated October 23, 2020, the Office of Judges found that Mr. Adkins has not established by a preponderance of the evidence that he sustained a greater whole person impairment than the 10% recommended by Dr. Bachwitt. Dr. Guberman’s report was given less evidentiary weight because his range of motion findings, which were significantly greater than any other physician that examined Mr. Adkins, were not in accord with the other evidence on record. In addition, Dr. Guberman misapplied the *AMA Guides* in combining upper extremity impairment for range of motion, sensory, and motor deficits. As reported by Dr. Bailey, if Dr. Guberman had applied the *Guides* appropriately, he would have found 16% whole person impairment, instead of 17%. The *Guides* state, “[w]hen multiple impairments of the extremity are present, such as amputation, loss of motion, or vascular disorders, the peripheral nerve impairment is combined with the other impairments.” As such, the Office of Judges concluded that the motor and sensory impairments are to be combined prior to being combined with the loss of motion impairment. Using this analysis, Dr. Guberman’s upper extremity impairment for sensory deficits should have been combined with his 14% upper extremity impairment for motor deficit, with the result being 19% upper extremity impairment for the brachial plexus injury per the Combined Values Chart. When the 19% is combined with Dr. Guberman’s 9% upper extremity impairment for range of motion loss the result is 26%, which converts to 16% whole person impairment. Because Dr. Guberman’s impairment rating was found to be erroneous, the Office of Judges concluded that Mr. Adkins failed to establish that he sustained more than the 10% whole person impairment recommended by Dr. Bachwitt, and the claims administrator’s Order dated August 3, 2018, was affirmed. The Board of Review adopted the findings of fact and

conclusions of law of the Office of Judges and affirmed the October 23, 2020, Decision on March 18, 2021.

After review, we agree with the conclusions of law of the Office of Judges as affirmed by the Board of Review. The evidence of record establishes that Mr. Adkins has not established that he sustained a greater whole person impairment than the 10% recommended by Dr. Bachwitt. The weight of the evidence shows that Mr. Adkins has been fully compensated for his compensable injury of July 26, 2017.

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

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