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Supreme Court, Appellate Division, Third Department, New York

In the Matter of GWENDOLYN TAYLOR, Appellant
v.

BUFFALO PSYCHIATRIC CENTER, Respondent
and
STATE INSURANCE FUND, Respondent
and
WORKERS' COMPENSATION BOARD, Respondent

October 14, 2021

Facts: Appeal from a decision of the Workers' Compensation Board, filed August 1, 2019, which denied claimant's request to reopen or rehear a prior decision.

The claimant filed a claim for an injury to the left shoulder with a date of accident of December 17, 2014 as a result of which, the claimant underwent surgery. The claimant reached maximum medical improvement and the attending physician filed a C-4.3 as well as an attached medical narrative setting forth his findings and commenting on permanency. However, the C-4.3 indicated a 15% schedule loss of use of the left shoulder and the medical narrative indicated a 35% schedule loss of use of the left shoulder. The Workers' Compensation Board issued a notice regarding a possible award of permanency referencing the 15% finding of the attending physician on the C-4.3. The Workers' Compensation carrier responded to the Board's notification indicating that they were accepting the attending physician's finding of a 15% schedule loss of use of the left shoulder. Accordingly, the Board issued a Proposed Decision with a finding of a 15% schedule loss of use of the left arm indicating that any objection should be filed on or before June 9, 2016. Neither the claimant, who was unrepresented, nor the employer or its carrier filed any objections.

In September of 2016, the claimant sustained another work-related injury to the left shoulder and filed a second claim, this time represented by counsel. Newly retained counsel discovered the discrepancy in the schedule loss of use percentage on the prior claim and filed an Application for Rehearing or Reopening of the May 5, 2016 Proposed Decision requesting that the decision be modified to reflect a 35% schedule loss of use. The Board, in a decision filed August 1, 2019, denied the application and the claimant appealed.

Holding: *Reversed.*

Discussion: The Court noted that the decision to grant an Application for Reopening or Rehearing in the interests of justice is a matter left to the Workers' Compensation Board's discretion and the Court's review of that decision is limited to whether there was an abuse of discretion by the Board.

Upon review, the Court noted that the Board abused its discretion and noted that although the C-4.3 indicated a 15% schedule loss of use, clearly the attending physician's findings in the attached medical narrative set forth and detailed that the claimant sustained a 35% schedule loss of use of the left shoulder. The Court emphasized that while the Board is free to reject the opinion of an expert where it finds such to be unconvincing or incredible, it may not reject an uncontradicted opinion that is properly rendered. The Board rejected the carrier's argument that it was prejudiced indicating the carrier clearly waived its right to obtain a consultant's examination.

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