COURT OF APPEALS OF VIRGINIA

Present: Judges Kelsey, Petty and Senior Judge Bumgardner

CUMBERLAND RESOURCES AND
AIG CLAIMS SERVICES, INC.

v. Record No. 3028-08-3

DAVID MICHAEL WHITT

MEMORANDUM OPINION*
PER CURIAM
APRIL 21, 2009

FROM THE VIRGINIA WORKERS' COMPENSATION COMMISSION

(John R. Sigmond; Penn, Stuart & Eskridge, on brief), for appellants.

(D. Allison Mullins; Lee & Phipps, P.C., on brief), for appellee.

Cumberland Resources and its insurer (collectively "employer") appeal a decision of the Workers' Compensation Commission modifying the deputy commissioner's award of permanent partial disability benefits to David Michael Whitt ("claimant") in connection with a knee and ankle injury sustained on May 10, 2005. While the commission denied claimant's request to change his treating physician from Dr. Whitman to Dr. McGarry, it averaged the impairment ratings of the two physicians with respect to claimant's knee. Employer contends that the commission's decision erroneously afforded Dr. McGarry treating physician status by giving his opinion equal weight to that of Dr. Whitman. It also asserts that credible evidence did not support the commission's decision to average the impairment ratings because Dr. McGarry's impairment rating is not supported by his records.

We have reviewed the record and the commission's opinion and find that this appeal is without merit. "Questions raised by conflicting medical opinions must be decided by the

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

commission." Penley v. Island Creek Coal Co., 8 Va. App. 310, 318, 381 S.E.2d 231, 236 (1989). Here, no evidence was presented that claimant's limitations resulted from a pre-existing condition. Instead, two physicians, both of whom treated claimant and performed surgery on his knee, reached divergent conclusions regarding the permanent impairment resulting from his injury. Dr. McGarry's conclusion regarding the degree of impairment was based upon the decreased range of motion in claimant's knee. "'Where there is a conflict of evidence . . . the [c]ommission's finding of fact is conclusive' when supported by credible evidence." Imperial Trash Serv. v. Dotson, 18 Va. App. 600, 603, 445 S.E.2d 716, 718 (1994) (quoting Byrd v. Stonega Coke & Coal Co., 182 Va. 212, 220, 28 S.E.2d 725, 729 (1944)). "[T]he evidence of [any given treating] physician . . . is not binding on the [c]ommission. The probative weight to be accorded such evidence is for the [c]ommission to decide; and if it is in conflict with other medical evidence, the [c]ommission is free to adopt that view which is most consistent with reason and justice." C.D.S. Constr. Services v. Petrock, 218 Va. 1064, 1071, 243 S.E.2d 236, 241 (1978) (citation and internal quotation marks omitted); see, e.g., Princess Anne Builders, Inc., v. Faucette, 37 Va. App. 102, 112-13, 554 S.E.2d 113, 118-19 (2001) ("[A]lthough the commission was entitled to give lesser weight to [the consulting physician's] opinion because he was not [claimant's] treating physician, it was not obligated to do so.").

Accordingly, we dispense with oral argument and summarily affirm because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process. See Code § 17.1-403; Rule 5A:27.

Affirmed.