

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Petitioner**

FILED
June 9, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**vs.) No. 100833 (BOR Appeal No. 2043861)
(Claim No. 980013826)**

**DANNY HONAKER,
Claimant Below, Respondent**

and

**MAPLE MEADOW MINING COMPANY,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 2, 2010, in which the Board affirmed a November 6, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's February 20, 2007 Order, which denied Mr. Honaker's request for permanent total disability benefits. The appeal was timely filed by the petitioner, and the West Virginia Office of Insurance Commissioner ("WVOIC") filed a response. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the Office of Judges grant of a permanent total

disability award with an onset date of September 11, 2006. WVOIC argues that the evidence indicates that Mr. Honaker is not permanently and totally disabled given his ability to perform activities of daily living, as indicated in the report of Dr. George Orphanos. Further, the WVOIC argues that, even if Mr. Honaker is permanently and totally disabled, it is due to non-compensable conditions. Finally, the WVOIC argues that Nancy R. Drwal's rehabilitation evaluation is unreliable because it is based on pre-existing income, despite the fact that comparison of pre-injury and post-injury income is not a factor in determining whether a claimant is permanently and totally disabled.

In reversing the claims administrator, the Office of Judges first noted that Dr. Orphanos's report does state that Mr. Honaker is not expected to perform any gainful work. (Nov. 6, 2009 Office of Judges Order, p. 9.) It also considered the vocational rehabilitation evaluation prepared by Errol Sadlon. *Id.* at p. 12. Mr. Sadlon found that Mr. Honaker is not capable of any sedentary positions previously identified as suitable for Mr. Honaker due to Mr. Honaker's inability to sit for extended periods of time. *Id.* Mr. Sadlon also stated that Mr. Honaker has difficulties with memory, attention, and concentration. *Id.* at 12-13. Mr. Sadlon concluded that Mr. Honaker is not capable of consistent employment over an 8 hour day, 40 hour week, and he is not a candidate for any work within a 75-mile radius of his home. *Id.* at 13.

The Office of Judges also addressed the argument that, should Mr. Honaker be found to be permanently and totally disabled, it is a result of non-compensable conditions. The Office of Judges noted that Mr. Honaker has been determined to have 40% impairment from compensable conditions. *Id.* Finally, the Office of Judges found Ms. Drwal's report persuasive in that it provides factors that indicate Mr. Honaker is permanently and totally disabled irrespective of its inclusion of a comparison of pre-injury and post-injury wages. *Id.* at 12. Plus, a supplemental vocational report that does not include such a comparison found no significant employment opportunities existing within a 75-mile radius of Mr. Honaker's home. Thus, the Office of Judges reversed the claims administrator, and the Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its June 2, 2010 decision.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. Therefore, the grant of petitioner's request for permanent total disability benefits as of September 11, 2006 is affirmed.

Affirmed.

ISSUED: June 9, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh