

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**STANLEY W. COOK,
Claimant Below, Appellant**

vs.) **No. 35731 (WCBOR No. 2043327)**
(Claim No. 990008014)

FILED

May 13, 2011

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

**WEST VIRGINIA OFFICE INSURANCE COMMISSION and
PERFORMANCE COAL COMPANIES,
Respondents below, Appellees**

MEMORANDUM DECISION

This is an appeal from the West Virginia Workers' Compensation Board of Review ("BOR") filed by Wilma Cook, the widow of the deceased claimant Stanley Cook.¹ The Workers' Compensation Office of Judges ("OOJ") found that Mr. Cook was permanently and totally disabled ("PTD"), with an onset date of August 1, 2000. By order dated January 27, 2010, the BOR affirmed the OOJ's finding that Mr. Cook was PTD but modified the OOJ's onset date. The BOR determined that the proper onset date was January 10, 2006. The claimant appealed the BOR's order, requesting that this Court reinstate the OOJ's finding that the onset date was August 1, 2000. In the alternative, the claimant asks this Court to set an onset date no later than April 29, 2003, the date Dr. Carlson examined Mr. Cook and concluded that he was PTD. This 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 is set for consideration under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the decision of the lower tribunal, the Court is of the opinion that the decisional process would not be aided by oral argument. Upon consideration of the standard of review, the Court determines that, in part, prejudicial error exists in the decision of the lower tribunal. However, the case does not present a new or significant question of law. For these reasons, a memorandum

¹ Mr. Cook died on December 5, 2007, while his claim was still pending. Pursuant to Syllabus Point 5 of *Martin v. Workers' Compensation Div.*, 210 W.Va. 270, 557 S.E.2d 324 (2001), a claim for PTD benefits is not extinguished by the claimant's death.

decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Mr. Cook worked in the coal mining industry from 1970 until July 30, 2000. He worked as a general laborer, a roof bolter, and a fire boss. He suffered a compensable injury on May 8, 1998, when a steel bar weighing 50 pounds fell 10 to 12 feet striking his right knee. Mr. Cook filed a petition for PTD benefits on June 9, 2003. His petition was referred to the Interdisciplinary Examining Board², who concluded that he was not PTD. Based on this conclusion, the Claims Administrator issued an April 12, 2006, order denying his claim for PTD benefits. Mr. Cook appealed this decision to the OoJ, who reversed the Claims Administrator's order.

The OoJ issued a thorough 11 page order, summarizing all of the evidence of record, including the medical evidence and multiple functional capacity examinations. The OoJ found the report by vocational consultant Lisa Goudy to be persuasive and deserving of substantial weight. Ms. Goudy determined that Mr. Cook was PTD based on his functional limitations resulting from his compensable injury, his age, and his lack of transferable skills. The OoJ determined that the "last day he worked was July 30, 2000. He was unable to engage in employment after that date. Therefore, the onset of the award should be calculated to begin on August 1, 2000[.]"

By Order entered on January 27, 2010, the BOR affirmed the OoJ's finding that Mr. Cook was PTD. However, the BOR found that the OoJ erred in determining the onset date. The BOR, relying on a functional capacity examination performed by Arthur Smith, concluded that the proper onset date of Mr. Cook's PTD was January 10, 2006. The claimant timely appealed this order.

Since both the OoJ and BOR agree that Mr. Cook was PTD, the only issue before this Court is the onset date of Mr. Cook's PTD. Our review is guided by Syllabus Point 2 of *Lambert v. Workers' Compensation Div.*, 211 W.Va. 436, 566 S.E.2d 573 (2002), which stated:

1 "Where there are multiple reports from various experts which establish that the claimant has currently reached permanent total disability status, the Workers' Compensation Commissioner has a reasonable discretion in selecting the beginning date for the award and payment of permanent total disability benefits. The

² The Interdisciplinary Examining Board was dissolved in 2005 and replaced by the Permanent Total Disability Reviewing Board.

selection should be based on the dates upon which the experts found the claimant to have been permanently and totally disabled.” Syllabus point 2, *Young v. Workers’ Compensation Commissioner*, 181 W.Va. 440, 383 S.E.2d 72 (1989).

Mr. Cook was examined by Dr. Carlson on April 29, 2003. Dr. Carlson conducted a thorough evaluation of the claimant and determined that:

By virtue of his age, education, intellect and vocational experience and training as well as physical and psychiatric impairment resulting from the above injuries and occupational disease, Mr. Cook is permanently and totally disabled. He is not a candidate for vocational rehabilitation.

The report of vocational consultant Lisa Goudy, discussed above, supports Dr. Carlson’s conclusion. It is also noteworthy that Mr. Cook received social security disability benefits beginning in July 2000.

The BOR’s decision to modify the onset date of Mr. Cook’s injury was based solely on a functional capacity examination performed by Arthur Smith on January 10, 2006. The BOR offers no reason why Dr. Carlson’s expert medical opinion should be ignored, nor does it offer a compelling reason to disregard Lisa Goudy’s report. Based on the totality of the evidence in the record, Mr. Cook was found to be PTD on April 29, 2003, by a medical expert. Based on this expert medical opinion, we hold that Mr. Cook’s PTD onset date is April 29, 2003.

Accordingly, we hold that, to the extent the Board of Review’s decision concluded that Mr. Cook was entitled to PTD benefits, the decision is affirmed. However, the onset date set forth in the Board of Review’s order is reversed, and this case is remanded to the Workers’ Compensation Board of Review with directions to enter an order modifying the claimant’s PTD onset date to April 29, 2003.

Affirmed, in part, reversed, in part, and remanded with directions.

ISSUED: May 13, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin J. Davis
Justice Menis E. Ketchum
Justice Thomas E. McHugh
Justice Benjamin disqualified