

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 8, 2013

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

**ROBERT DILLOW JUSTICE,
Claimant Below, Petitioner**

vs.) **No. 11-1007** (BOR Appeal No. 2045462)
(Claim No. 2011008773)

and

**PANTHER BRANCH COAL COMPANY,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Robert Dillow Justice, by Wendle D. Cook, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Panther Branch Coal Company, by Robert J. Busse, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated June 10, 2011, in which the Board affirmed a December 23, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 1, 2010, decision denying Mr. Justice's application for workers' compensation benefits. It was held that Mr. Justice's condition of avascular necrosis of the hip is not a compensable condition. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

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.

Mr. Justice alleged that he suffered an injury to his hip and back while riding on a mantrip shuttle. At the time of the alleged injury, Mr. Justice was working as a coal miner for Panther Branch Coal Company. On October 1, 2010, the claims administrator denied

compensability of Mr. Justice's claim based on the absence of an incident report and records from Dr. Cheung that stated that Mr. Justice denied any hip pain subsequent to July of 2010. Mr. Justice protested the decision of the claims administrator.

On appeal, Mr. Justice argues that the elements necessary for compensability have been proven by his testimony. Panther Branch Coal Company maintains that the decision should be affirmed because there are no contemporaneous medical records to evaluate the alleged hip injury on or about June 3, 2010, and argues that several subsequent records from July of 2010 failed to support Mr. Justice's version of the events.

The Office of Judges found Mr. Justice's explanation of his injury to be not credible and reasoned that the severe nature of avascular necrosis would have caused immediate symptoms which would not allow Mr. Justice to delay treatment for several weeks. It was noted that Mr. Justice did not seek medical treatment following the alleged incident of early June of 2010, until July 23, 2010, and failed to report the alleged June incident until August 8, 2010, a month after seeking treatment for his hip. Relying on Dr. Cheung's records that the avascular necrosis was present prior to the alleged injury of July 22, 2010, the Office of Judges found that a preponderance of the evidence does not support holding the claim compensable.

The Office of Judges ultimately concluded that Mr. Justice's claim is not compensable and is not related to any work incident that occurred in early June of 2010 or on July 22, 2010. The Board of Review reached the same reasoned conclusions. We agree with the June 10, 2011, decision of the Board of Review.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: May 8, 2013

CONCURRED IN BY:

Justice Robin J. Davis
Justice Margaret L. Workman
Justice Allen H. Loughry II

DISSENTING:

Chief Justice Brent D. Benjamin
Justice Menis E. Ketchum