

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 8, 2013

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

**JAMES L. STOLLINGS,
Claimant Below, Petitioner**

vs.) **No. 11-1074** (BOR Appeal No. 2045505)
(Claim No. 990067259)

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

and

**BAR-K, INC.,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner James L. Stollings, by John C. Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Gary M. Mazezka, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated June 24, 2011, in which the Board affirmed a January 5, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 15, 2008, decision that denied Mr. Stollings's claim for permanent total disability benefits. 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. Stollings worked at Bar-K Mining. He suffered various compensable injuries. On April 15, 2008, the claims administrator denied Mr. Stollings's request for permanent total disability benefits based upon the Permanent Total Disability Review Board's Final Recommendations dated November 26, 2007, that found "that the claimant is able to engage in gainful employment requiring skills, or abilities which can be acquired at the sedentary physical demand level," and West Virginia Code §§ 23-4-6(n)(2) and 23-4-6(j)(5) (2005).

The Office of Judges concluded that Mr. Stollings was not permanently and totally disabled because the Permanent Total Disability Review Board found that while Mr. Stollings's compensable injuries did place restrictions on the types of occupations in which he is able to engage, it is his non-compensable medical conditions that are most limiting, and he does have residual employment potential in accordance with his compensable diagnoses. On appeal, Mr. Stollings disagrees and asserts that the Office of Judges erred in stating that he was most limited by non-compensable conditions because reliable evidence of the record shows otherwise, specifically Dr. Carlson's list of compensable conditions that limit Mr. Stollings greatly, and Mr. Sadlon's vocational findings. The West Virginia Office of Insurance Commissioner maintains that Mr. Stollings is not entitled to permanent total disability benefits because the evidence establishes that he can return to the work force, that his disability is due in part to his non-compensable conditions, and that there are suitable employment opportunities available to him.

Mr. Sadlon performed a rehabilitation evaluation and reported that Mr. Stollings is incapable of performing at the medium or sedentary physical demand level and returning to his previous job due to cognitive/psychological problems. The Office of Judges concluded that Mr. Sadlon did not apply the standards for permanent total disability because there was no functional capacity evaluation available at the time, and he appears to have relied on Mr. Stollings's subjective opinions of his disability. The Office of Judges mentioned that Mr. Sadlon failed to perform any transferrable skills analysis or labor market survey, like the other vocational evaluators of record. . On November 13, 2003, Dr. Carlson opined that Mr. Stollings in part was permanently and totally disabled due to adjustment disorder with depressed mood. The Office of Judges noted that by the time of Dr. Weise's February 2, 2005, and Dr. Miller's May 17, 2010, psychiatric evaluations, Mr. Stollings no longer had an Axis I diagnosis of adjustment disorder. Dr. Weise also stated that in his opinion "there is no injury related psychiatric impairment at this time." The Office of Judges noted that the functional capacity evaluation performed on April 20, 2004, contained discrepancies similar to those contained in the functional capacity evaluation performed on March 30, 2010, in which Ms. Weigel stated that Mr. Stollings demonstrated unreliable effort in the evaluation. On May 17, 2010, psychiatrist Bobby Miller performed a permanent total disability evaluation and concluded that Mr. Stollings did not have a psychiatric diagnosis causally related to the compensable injury. The two rehabilitation evaluations performed on May 31, 2005, and July 23, 2010, both concluded that Mr. Stollings was capable of performing at a sedentary and light physical demand level, that jobs within a seventy-five miles radius of his home were available, and he is not permanently and totally disabled. The Office of Judges concluded that the preponderance of the medical, psychiatric, and vocational evidence establishes that Mr. Stollings is not permanently and totally disabled. The Board of Review

reached the same reasoned conclusions in its decision of June 24, 2011. We agree with the reasoning and conclusions 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 Menis E. Ketchum
Justice Allen H. Loughry II

DISSENTING:

Chief Justice Brent D. Benjamin