

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

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

**HAROLD L. DANCY II,
Claimant Below, Petitioner**

vs.) **No. 12-0531** (BOR Appeal No. 2046451)
(Claim No. 2011035906)

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

MEMORANDUM DECISION

Petitioner Harold L. Dancy II, by Wendle 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 March 28, 2012, in which the Board affirmed a September 1, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 18, 2011, decision rejecting the claim. The Office of Judges also dismissed Mr. Dancy's protest of the claims administrator's May 16, 2011, decision. 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. Dancy worked as a shuttle car operator in an underground mine for Panther Branch Coal Company. On May 3, 2011, Mr. Dancy submitted a report of injury filled out by Dr. Bailey. The report stated that on April 28, 2011, Mr. Dancy was climbing through a manhole when he twisted and fell on his back. Dr. Bailey diagnosed Mr. Dancy with a lumbar sprain. Dr. Bailey noted that Mr. Dancy had several prior injuries including several low back injuries. Following a second examination, Dr. Bailey noted that Mr. Dancy had undergone a lumbar microdiscectomy

in June of 2009 and changed her diagnosis to chronic lower back pain. On May 16, 2011, the claims administrator rejected Mr. Dancy's application for workers' compensation benefits. The claims administrator then issued a second decision on May 18, 2011, correcting the May 16, 2011, decision and rejecting Mr. Dancy's claim because there were sufficient inconsistencies and contradictions in his application to conclude that he had not been injured in the course of and resulting from his employment. Following this decision, Mr. Dancy testified at a hearing before the Office of Judges. Mr. Dancy acknowledged that there were no witnesses to his injury but stated that his condition had worsened since the April 28, 2011, injury. On September 1, 2011, the Office of Judges affirmed the claims administrator's May 18, 2011, decision. The Office of Judges also dismissed Mr. Dancy's protest of the claims administrator's May 16, 2011, decision as moot. The Board of Review then affirmed the Order of the Office of Judges on March 28, 2012, leading Mr. Dancy to appeal.

The Office of Judges concluded that the claims administrator's May 16, 2011, decision was rendered moot by the subsequent corrected decision of May 18, 2011. The Office of Judges also concluded that Mr. Dancy's claim was not compensable. The Office of Judges found that Mr. Dancy did not sustain a work-related injury. The Office of Judges pointed out that Dr. Bailey modified her initial diagnosis to reflect that Mr. Dancy's current symptoms were the result of chronic pain and not an acute injury. The Office of Judges found that Mr. Dancy's testimony was not persuasive because it was inconsistent and unsubstantiated. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Mr. Dancy has not presented sufficient credible evidence to demonstrate that he sustained an injury in the course of and resulting from his employment on April 28, 2011. There were no witnesses who could substantiate that Mr. Dancy sustained a work-related injury. The only evidence that Mr. Dancy has presented in his favor is his own testimony. But the Office of Judges pointed out several reasons for finding that his testimony was not persuasive and was within its discretion in not relying on it. The remaining evidence in the record is not sufficient to show that he sustained a work-related injury.

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: January 14, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum

Justice Allen H. Loughry II

Justice Brent D. Benjamin, not participating