

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

CHARLES W. TILLEY, Petitioner

vs.) **No. 11-0182** (BOR Appeal No. 2044607)
(Claim No. 98001786)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
MAPLE MEADOW MINING COMPANY, Respondent**

FILED
December 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner, Charles W. Tilley, by John H. Shumate Jr., appeals the West Virginia Workers' Compensation Board of Review Order denying him a permanent total disability award. The West Virginia Office of Insurance Commissioner, by Mary Rich Maloy, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 19, 2011, in which the Board reversed an April 30, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's May 5, 2008, Order, which denied Mr. Tilley a permanent total disability award. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Having considered the petition 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 briefs, and the record presented, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Mr. Tilley received several compensable injuries during the course of his employment as a coal miner. Mr. Tilley was found to have 42% whole person medical impairment, which satisfied the statutory threshold for consideration of a permanent total disability award. Thus, the Permanent Total Disability Reviewing Board ("PTD Reviewing Board") convened to determine whether Mr. Tilley is capable of performing substantial gainful activity. The PTD Reviewing Board, relying on the report of Drema Bess, found Mr. Tilley capable of performing substantial gainful employment as a coal mine guard.

Ms. Bess found that Mr. Tilley could perform at the light physical demand level. She also noted that, despite his functional illiteracy and limited education, he "has demonstrated by past

work experience he can learn by the on the job training.” Several jobs, including coal mine guard, were identified within a 75 mile radius of Mr. Tilley.

The claims administrator denied Mr. Tilley’s request for a permanent total disability award. The Office of Judges, however, reversed this decision. It placed substantial weight on Mr. Tilley’s vocational rehabilitation potential - or lack thereof. It concluded that Mr. Tilley’s functional illiteracy, low IQ, age, and minimal education present “significant rehabilitation barriers.”

The Board of Review reversed the Office of Judges, however, in its January 19, 2011, decision. It noted that Mr. Tilley’s past jobs have included those in the medium and light physical demand levels, and he is currently capable of performing at the light physical demand level. Moreover, there are jobs he is capable of performing within a 75 mile radius. Thus, the Board of Review reversed the Office of Judges and reinstated the claims administrator’s denial of a permanent total disability award.

The Board of Review’s decision should be reversed. Pursuant to West Virginia Code § 23-4-6(n)(2), the Office of Judges thoroughly reviewed all reports of record. In addition to Mr. Tilley’s functional limitations stemming from his compensable injuries, the Office of Judges also noted that Mr. Tilley’s limited intellectual functional ability, functional illiteracy, age, limited education, and lack of a GED all preclude vocational rehabilitation to return to substantial gainful activity. As a result, these limitations also prevent Mr. Tilley from returning to substantial gainful employment. Accordingly, Mr. Tilley should be granted a permanent total disability award from the date of disability as determined by the Office of Judges: October 12, 2007.

For the foregoing reasons, we find that the decision of the Board of Review is in clear violation of constitutional or statutory provision, it is clearly the result of erroneous conclusions of law, and it is so clearly wrong based upon the evidentiary record that 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 Court reverses the Board of Review and grants the claimant a permanent total disability award with an onset date of October 12, 2007.

Reversed.

ISSUED: December 12, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Robin Jean Davis