

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

DENNIS W. CROWE,
Claimant Below, Petitioner

vs.) No. 100818 (BOR Appeal No. 2043840)
(Claim No. 2001006069)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

ROADWAY STABILIZATION, INC.,
Employer Below, Respondent

FILED
July 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 2, 2010, in which the Board affirmed a November 13, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 20, 2009 Order holding that Mr. Crowe has not met the statutory threshold for further consideration of a permanent total disability award. The appeal was timely filed by the petitioner, and the Insurance Commissioner filed a response. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, the Court is of the opinion that this case is appropriate for consideration under the Revised Rules. Having considered the parties' submissions 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 Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the denial of Mr. Crowe's request for permanent total

disability benefits. In arguing that he has met the statutory threshold for consideration of a permanent total disability award, Mr. Crowe cites to the report of Dr. Bruce A. Guberman. Dr. Guberman identified 22% impairment for Mr. Crowe's lumbar spine, 10% impairment for his cervical spine, 15% impairment for sexual dysfunction, 9% impairment for bladder dysfunction, and 4% impairment for his left knee for a combined values total of 48% whole person impairment. Dr. Guberman combined this impairment rating with the previously awarded 8% psychiatric impairment to arrive at a 52% combined whole body medical impairment rating.

The Office of Judges, however, took issue with Dr. Guberman's report. (Nov. 13, 2009 Office of Judges Order, p. 9.) The Office of Judges noted that Dr. Guberman placed Mr. Crowe in the second category of Table 17 of the *AMA Guides*, which states that "Patient has good bladder reflex activity, limited capacity, and intermittent emptying without voluntary control." *Id.* The Office of Judges found Dr. Jerry Scott's categorization of Mr. Crowe more in line with Mr. Crowe's own assertions: "Patient has some degree of voluntary control but is impaired by urgency or intermittent incontinence." *Id.* Indeed, Mr. Crowe's medical records indicate that he experiences urgency throughout the day and night and sometimes experiences incontinence. *Id.* Thus, Dr. Scott placed Mr. Crowe in the first category of Table 17, which resulted in a lower impairment rating.

Further, Dr. Guberman placed Mr. Crowe in Category II-B regarding his cervical spine impairment, but Dr. Guberman did not explain the basis for his categorization of Mr. Crowe's impairment. *Id.* at p. 10. Dr. Scott, on the other hand, placed Mr. Crowe in Category II-A finding that "there is no specific spine disorder identified related to this claim." *Id.* Because Dr. Scott explained the basis for his categorization, his report was accorded more weight. *Id.*

Finally, Mr. Crowe's evaluation by Dr. Victor Poletajev's was similarly found to lack credibility due to its conflicting nature. *Id.* At the beginning of the report, Dr. Poletajev found that Mr. Crowe is stable and suffering from no exacerbations, and yet he nonetheless concluded that Mr. Crowe is suffering multiple exacerbations. *Id.* Accordingly, the Office of Judges affirmed the denial of Mr. Crowe's request for consideration of a permanent total disability award due to its finding of only 31% whole person impairment, and the Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of June 2, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner's request for consideration of a permanent total disability award is affirmed.

Affirmed.

ISSUED: July 25, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh