

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JAMES MIKE AYERS,
Claimant Below, Petitioner

vs.) No. 100822 (BOR Appeal No. 2043904)
(Claim No. 980059990)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

ANCHOR-WV MINING COMPANY, 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 4, 2010, in which the Board reversed a November 17, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's April 29, 2008 Order, which denied Mr. Ayers's petition for permanent total disability benefits. 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 reversed the Office of Judges grant of a permanent total

disability award and reinstated the claims administrator's denial of Mr. Ayers's petition for benefits. During prior proceedings, Mr. Ayers was found to have met the 40% statutory whole-person impairment statutory threshold for permanent total disability benefits. W. Va. Code § 23-4-6(n)(1) (2003). Thus, at issue in this proceeding is whether Mr. Ayers's disability renders him "unable to engage in substantial gainful activity requiring skills or abilities which can be acquired or which are comparable to those of any gainful activity in which he or she has previously engaged." *Id.* at § 23-4-6(n)(2).

Mr. Ayers notes that vocational assessments performed by two different individuals conclude that he is unable to engage in gainful employment. Dwight L. McMillion, a rehabilitation counselor, concluded that Mr. Ayers is not capable of engaging in substantial, gainful employment and has been unable to work or benefit from vocational rehabilitation since May 19, 1998. Similarly, Casey Vass, RN, MS, found that Mr. Ayers is unable to engage in any type of gainful employment or participate in a vocational rehabilitation program.

The Board of Review, however, looked to the Permanent Total Disability Reviewing Board's conclusions in reinstating the claims administrator's denial of Mr. Ayers's request for permanent total disability benefits. (June 4, 2010 Board of Review Order, p.2-3.) The Permanent Total Disability Reviewing Board discounted several doctor's reports that took into consideration Mr. Ayers's preexisting arthritis and osteoarthritis as non-work related medical conditions are excluded from consideration in determining rehabilitation potential. (Nov. 26, 2007 Permanent Total Disability Reviewing Board Final Recommendations, p. 8.) Evaluations that took into consideration Mr. Ayers's advanced age were also discounted as age cannot be considered in determining rehabilitation potential. *Id.* The Reviewing Board, instead, relied on Dr. Barry Levin, Mr. Ayers's treating physician, who recommended that Mr. Ayers pursue light duty work. The Reviewing Board also found several jobs within a 75 mile radius of Mr. Ayers's home within his physical demand level that he would be qualified to perform.

The Board of Review also noted that instead of following his own treating physician's recommendation that he seek light duty employment that did not require lifting, Mr. Ayers chose not to participate in vocational rehabilitation services. "An injured worker who fails, without a showing of good cause, to participate in a rehabilitation evaluation, to participate in an authorized rehabilitation plan, or fails to show satisfactory progress toward completion of the plan, may be denied any applicable form of benefits[.]" W. Va. Code R. § 85-15-2.2.a. Thus, the Board of Review concluded that Mr. Ayers has not been rendered permanently and totally disabled. (June 4, 2010 Board of Review Order, p. 3.)

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 so clearly wrong based upon the evidentiary record that even 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 denial of the petitioner's request for permanent total disability benefits is affirmed.

Affirmed.

ISSUED: July 25, 2011

CONCURRED IN BY:

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Margaret L. Workman

Justice Menis E. Ketchum