

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

JAMES A. MILAM JR., Petitioner

February 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 101373 (BOR Appeal No. 2044193)**
(Claim No. 2000047422)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ESSENTIAL FUELS, INC., Respondent**

MEMORANDUM DECISION

Petitioner James A. Milam Jr., by John Blair, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying permanent total disability benefits. The West Virginia Office of Insurance Commissioner, by Anna Faulkner, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 12, 2010, in which the Board affirmed a March 3, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the Claims Administrator's October 10, 2008, Order denying permanent total disability benefits. 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, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. 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 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 held the preponderance of the evidence demonstrated Mr. Milam is not permanently and totally disabled as a result of his compensable injuries and

diseases. Mr. Milam disagrees and argues that credible and reliable evidence demonstrating he was unable to return to substantial gainful activity was ignored. He also contends that the Social Security decision regarding his disability was not given the weight it was entitled.

The Office of Judges relied on the reports of Olen Dodd and Michael Price in concluding that Mr. Milam is capable of returning to substantial gainful activity at a sedentary/light work classification. (March 3, 2010, Office of Judges Order, p.7). Evidence demonstrates that from both an orthopedic and psychiatric standpoint, Mr. Milam is able to return to light work with some restrictions. Additionally, the Office of Judges discussed Errol Sadlon's report which found Mr. Milam could not sit or stand up to six hours a day and thus could not perform even sedentary work; however, it noted that the petitioner had been performing work as a pastor for several years. *Id.* at p.6.

Finally, with respect to Mr. Milam's assertion that his Social Security Disability award was not given more weight in the determination of whether he is permanently and totally disabled, this Court notes that while receipt of a Social Security disability award may be "persuasive evidence of the onset of [permanent total disability]," it is not conclusive. *Lambert v. Workers' Comp. Div.*, 211 W. Va. 436, 448, 566 S.E.2d 573, 585 (2002). The Office of Judges noted that the decision itself indicated the claimant can perform at a sedentary level. (March 3, 2010, Office of Judges Order, p.7). Moreover, the Office of Judges found the fully developed record including reports on psychiatric, orthopedic, and functional capacities indicates that Mr. Milam is capable of returning to substantial gainful activity at a sedentary work level. *Id.* The Board of Review reached the same reasoned conclusion in its October 12, 2010, decision.

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 Board of Review Order is affirmed.

Affirmed.

ISSUED: February 22, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh