

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

KENNETH EARL FLEMING, Petitioner

March 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101490 (BOR Appeal No. 2044479)
(Claim No. 2004006004)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
APOGEE COAL COMPANY/ARCH OF WEST VIRGINIA,
Respondent**

MEMORANDUM DECISION

Petitioner Kenneth Earl Fleming, by John Blair, his attorney, appeals the decision of the Board of Review. The West Virginia Office of Insurance Commissioner, by Gary Mazecka, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 25, 2010, in which the Board affirmed an April 22, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 18, 2008, decision denying Mr. Fleming's request for 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.

In its Order, the Office of Judges held that Mr. Fleming is not entitled to permanent total disability benefits. Mr. Fleming disputes this finding and asserts, per the opinion of vocational rehabilitation consultant Mr. Errol Sadlon, that he is permanently and totally disabled as a result of multiple injuries received in the course of his employment.

Although Mr. Fleming has sufficient whole person impairment to a warrant permanent total disability award he is nevertheless capable of substantial gainful employment. The Office of Judges found that Mr. Fleming ceased working because he was laid off, and that following this lay-off, he held himself out as available to work and received unemployment benefits. The Office of Judges then found that Mr. Fleming returned to work following each compensable injury; that the medical and vocational evidence demonstrates that Mr. Fleming was able to function well with the effects of his compensable injuries; and that the lay-off, not an injury, precipitated Mr. Fleming's withdrawal from the workforce. The Board of Review reached the same reasoned conclusion in its decision of October 25, 2010.

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 the Board's material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: March 26, 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