

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

JIMMY L. WILLIAMS, Petitioner

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

vs.) No. 11-0069 (BOR Appeal No. 2045004)
(Claim No. 2005040594)

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

MEMORANDUM DECISION

Petitioner, Jimmy L. Williams, by William B. Gerwig III, his attorney, appeals the Board of Review Order granting him an additional 26% permanent partial disability award for his compensable injuries. The West Virginia Office of Insurance Commissioner did not file a response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 23, 2010, in which the Board affirmed a September 3, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's 26% permanent partial 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, response, 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.

Mr. Williams suffered cervical, lumbar, and thoracic spine injuries when he fell off a wooden header and landed on his back. As a result of this injury, Mr. Williams underwent a lumbar fusion at L4-5 and an additional L4-5 laminotomy and partial removal of hardware. No surgeries were performed on Mr. William's cervical or thoracic spine. The claims administrator initially granted Mr. Williams a 4% permanent partial disability award for the compensable injuries. On September 2,

2009, the claims administrator granted Mr. Williams an additional 26% permanent partial disability award.

Dr. Joseph E. Grady II, M.D. conducted an independent medical evaluation on August 18, 2009, at which time he diagnosed Mr. Williams with cervical myofascial strain; resolved thoracic spine strain; and status post lumbar fusion at L4-5 with subsequent repeat lumbar surgery with L4-5 laminotomy and partial removal of hardware, and L5 radiculopathy. Based on this evaluation, Dr. Grady assigned Mr. Williams with impairment ratings in accordance with West Virginia Code of State Rules §§ 85-20-E, 85-20-D, and 85-20-E. For the cervical spine Mr. Williams was rated with a 5% impairment, 0% impairment for the thoracic spine, and 25% impairment for the lumbar spine based on the lumbar fusion and L5 radiculopathy.

On January 25, 2010, Dr. Joseph A. Snead, M.D., conducted an additional independent medical evaluation and diagnosed Mr. Williams with cervical and thoracic spine sprains and history of lumbar degenerative / herniated disc at L4-5 level, postoperative instrument infusion at the L4-5 level with two surgeries. Mr. Williams was assigned 8% impairment for the cervical spine, 8% for the thoracic spine, and 28% for the lumbar spine. Dr. Paul Bachwitt, M.D., conducted a final evaluation on June 9, 2010, at which time Dr. Bachwitt assigned 5% impairment for the cervical spine, 5% for the thoracic spine, and 20% for the lumbar spine.

The Office of Judges held Dr. Grady's report correctly referenced the American Medical Association's, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) and West Virginia Code of State Rules § 85-20-1, et seq. Dr. Grady was also able to obtain valid range of motion measurements during his evaluation. Dr. Snead was determined to be the only evaluating physician to assign any impairment for right ankle weakness and his report's range of motion restrictions were the highest of record. Dr. Bachwitt was unable to obtain valid range of motion restrictions during his evaluation and was the only physician not to place Mr. Williams into Category V, Table 85-20-E for the lumbar spine injury. As a result, the Office of Judges held Dr. Grady's report is the most persuasive and credible evaluation of record. The Office of Judges found no basis for awarding Mr. Williams' additional permanent partial disability or for disputing the claims administrator's findings. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of December 23, 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 a material misstatement or mischaracterization of the evidentiary record. Therefore, the Court affirms the Board of Review Order granting Mr. Williams an additional 26% permanent partial disability award.

Affirmed.

ISSUED: July 26, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum