

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

February 8, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

EDDIE W. CLINE,
Claimant Below, Petitioner

vs.) **No. 11-0809** (BOR Appeal No. 2045167)
(Claim No. 2004036274)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER**
Commissioner Below, Respondent

and

GLADY FORK MINING,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Eddie W. Cline, by Reginald Henry, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Gary Mazezka, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 18, 2011, in which the Board affirmed an October 8, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 28, 2009, decision denying permanent total disability benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Cline worked as a mine electrician and mechanic for over thirty years. During that time he suffered various injuries, including injuries to his lumbar spine, cervical spine, right shoulder, right wrist, and occupational pneumoconiosis. On August 8, 2007, Mr. Cline filed an application for permanent total disability benefits. On December 10, 2009, the Permanent Total Disability Review Board issued its final recommendations finding that Mr. Cline suffered from 40% whole person impairment resulting from his compensable injuries. The claims administrator on December 28, 2009, denied the application for permanent total disability benefits because Mr. Cline had not met the 50% whole person impairment threshold.

The Office of Judges held that the preponderance of the evidence did not establish that Mr. Cline suffers from 50% whole person impairment due to compensable injuries. On appeal, Mr. Cline argues that Dr. Guberman's findings were the most reliable, and that he is entitled to an additional 10% impairment for occupational pneumoconiosis based on a settlement agreement. The West Virginia Office of Insurance Commissioner maintains that the Permanent Total Disability Review Board's findings were correct, and that Mr. Cline is not entitled to an additional 10% impairment because the settlement award does not relate to actual impairment.

In affirming the claims administrator's denial of permanent total disability benefits, the Office of Judges noted that Dr. Guberman consistently found Mr. Cline suffered from a significantly higher impairment than any other evaluators. It also noted that Dr. Guberman was the only evaluator to find sensory loss. The Office of Judges found that the Permanent Total Disability Review Board was correct to grant impairment based on its evaluation of the claimant, rather than a settlement agreement. The Board of Review reached the same reasoned conclusions in its Order of April 18, 2011. The Board of Review also noted that even if the Permanent Total Disability Review Board had used a 10% impairment for occupational pneumoconiosis, Mr. Cline still would not have met the 50% threshold. We agree with the reasoning and conclusions of the Board of Review.

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 decision of the Board of Review is affirmed.

Affirmed.

ISSUED: February 8, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II