

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

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

RODNEY W. KIRK,
Claimant Below, Petitioner

vs.) **No. 11-0837** (BOR Appeal No. 2045196)
(Claim No. 980028462)

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

and

MOUNTAINEER COACH, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Rodney W. Kirk, 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 Anna Faulkner, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 26, 2011, in which the Board affirmed an October 19, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's August 5, 2009, Order granting Mr. Kirk a 3% permanent partial disability award for psychiatric impairment resulting from the compensable injury. 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. Kirk was working for Mountaineer Coach, Inc. when he injured his lower right leg and back. As a result of this injury, Mr. Kirk suffered from psychiatric problems. The claims administrator on August 5, 2009, granted Mr. Kirk a 3% permanent partial disability award for psychiatric impairment.

The Office of Judges reversed the claims administrator's Order, and found that Mr. Kirk was entitled to a 4% permanent partial disability award for psychiatric impairment relating to the compensable injury. On appeal, Mr. Kirk argues that he is entitled to a 15% permanent partial disability award for psychiatric impairment based on the report by Dr. Riaz. The West Virginia Office of Insurance Commissioner maintains that he is not entitled to more than a 4% award. The medical evidence includes a July 8, 2009, report by Dr. Faheem finding that Mr. Kirk suffers from a 3% whole person impairment due to psychiatric impairment. On January 29, 2010, Dr. Riaz found that the primary factor causing Mr. Kirk's psychiatric issues was the compensable injury, and that he suffers from a 15% whole person impairment. Dr. Smith on July 26, 2010, found that while Mr. Kirk suffered from a 14% whole person impairment for psychiatric issues, only 4% was related to the compensable injury.

In reversing the claims administrator's Order, the Office of Judges concluded that according to Dr. Smith, Mr. Kirk suffered from a 4% whole person impairment due to psychiatric problems. The Office of Judges noted that Dr. Riaz failed to follow the applicable guidelines in West Virginia Code of State Rules § 85-20 (2006), setting forth the protocol for the determination of psychiatric impairment. Dr. Smith's report followed the proper procedure for determining psychiatric impairment, thus the Office of Judges granted Mr. Kirk a 4% permanent partial disability award. The Board of Review reached the same reasoned conclusions in its decision of April 26, 2011. 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