

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

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

JAMES A. PILLO,
Claimant Below, Petitioner

vs.) **No. 12-0525** (BOR Appeal No. 2046564)
(Claim No. 2005203889)

CONSOLIDATION COAL COMPANY,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner James A. Pillo, by Robert L. Stultz, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Consolidation Coal Company, by Gary W. Nickerson, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 28, 2012, in which the Board affirmed an October 26, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's January 25, 2008, decision denying a permanent total disability award. 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. Pillo worked as a miner for Consolidation Coal Company for over thirty years. During his time there, Mr. Pillo received several permanent partial disability awards for occupational injuries including awards for occupational pneumoconiosis, hearing loss, and injuries to his right leg. Mr. Pillo filed for permanent total disability benefits based on these injuries. Andrew Barrish then performed a functional capacity evaluation on Mr. Pillo and found that he could perform work at a medium demand level with some restrictions. James Williams then performed a vocational evaluation on Mr. Pillo and found that Mr. Pillo had transferable

skills that would be an asset to certain types of employers. He also found that there were numerous light and sedentary job openings available in Mr. Pillo's local labor market. Mr. Pillo was then evaluated by the Permanent Total Disability Examining Board who recommended against granting him a permanent total disability award because Mr. Pillo could return to gainful employment at a medium demand level. Based on this recommendation, the claims administrator denied Mr. Pillo's application for permanent total disability benefits on January 25, 2008. Following this decision, Lisa Goudy performed a vocational evaluation on Mr. Pillo. She believed that Mr. Pillo was permanently and totally disabled because he had worked as an underground coal miner for over thirty years but the job provided no transferable skills that would allow him to seek employment elsewhere. Erin Saniga then performed a vocational evaluation on Mr. Pillo and identified several transferable skills associated with the positions that Mr. Pillo had previously held. Ms. Saniga also identified several available positions that required light or sedentary demand level and were located in Mr. Pillo's geographic area. Ms. Saniga found that the majority of these positions were on an entry level or offered job training. On October 26, 2011, the Office of Judges affirmed the claims administrator's decision. The Board of Review then affirmed the Order of the Office of Judges on March 28, 2012, leading Mr. Pillo to appeal.

The Office of Judges concluded that Mr. Pillo was not permanently and totally disabled. In making this determination, the Office of Judges relied on the functional capacity evaluation of Mr. Barrish, who found that Mr. Pillo could work at a medium physical demand level. The Office of Judges found that there were no other functional capacity evaluations in the record and Mr. Barrish's opinion was not sufficiently impeached. The Office of Judges also relied on the reports of Mr. Williams and Ms. Saniga, who found that there were numerous job openings within Mr. Pillo's geographic area which were categorized as light or sedentary physical demand level. The Office of Judges found that these reports were persuasive because they were based on a functional capacity evaluation, labor market surveys, and transferable skills analyses. The Office of Judges found that Ms. Goudy's report was less persuasive because she did not conduct a transferable skills analysis or a labor market survey. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Mr. Pillo has not demonstrated that he is permanently and totally disabled such that he is unable to engage in substantial gainful employment. West Virginia Code § 23-4-6(n)(2) (2005). The functional capacity evaluation of Mr. Barrish demonstrates that Mr. Pillo can work at a medium demand level. The vocational reports of Mr. Williams and Ms. Saniga demonstrate that there are numerous jobs in Mr. Pillo's geographic area which he can perform. The reports of Mr. Williams and Ms. Saniga also show that Mr. Pillo has transferable skills which would be beneficial to certain employers. These reports are consistent with the record as a whole.

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: January 14, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis
Justice Margaret L. Workman
Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum

Justice Brent D. Benjamin, not participating