

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

June 27, 2014

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

**SUSAN STERN,
Claimant Below, Petitioner**

vs.) **No. 13-0303** (BOR Appeal No. 2047579)
(Claim No. 2001052618)

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

and

**WEST VIRGINIA DEPARTMENT OF AGRICULTURE,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Susan Stern, by M. Jane Glauser, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of the Insurance Commissioner, by Gregory Evers, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 25, 2013, in which the Board affirmed an August 1, 2012, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 28, 2011, decision granting Ms. Stern a permanent total disability award with an onset date of February 11, 2011. 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.

Ms. Stern initially filed an application for permanent total disability benefits on June 19, 2007. Ms. Stern's June 19, 2007, application for permanent total disability benefits was rejected by the claims administrator on August 8, 2007, based on a finding that she had not met the statutory threshold necessary for further consideration of permanent total disability benefits contained in West Virginia Code § 23-4-6(n)(1) (2005). The Office of Judges affirmed the claims administrator's decision rejecting Ms. Stern's application for permanent total disability benefits on April 30, 2008. On December 1, 2008, the Board of Review affirmed the Office of Judges' April 30, 2008, Order. This Court refused Ms. Stern's petition appealing the Board of Review's Order on December 7, 2009.

On February 11, 2011, Ms. Stern filed a second application for permanent total disability benefits indicating that she has now met the necessary threshold for further consideration of a permanent total disability award and has lost sight in both eyes. Ms. Stern was granted a permanent total disability award on December 28, 2011, with a permanent total disability onset date of February 11, 2011, based on her February 11, 2011, application for permanent total disability benefits. The decision granting a permanent total disability award was presumably based on the presumption contained in West Virginia Code § 23-4-6(m) (2005), and the fact that Ms. Stern has now met the necessary threshold for further consideration of a permanent total disability award.

In its Order affirming the claims administrator's decision, the Office of Judges held that the claims administrator properly determined that the appropriate permanent total disability onset date in the instant claim is February 11, 2011, pursuant to West Virginia Code § 23-4-6(j)(5) (2005). Ms. Stern disputes this finding and asserts that she is entitled to an earlier onset date for permanent total disability benefits based on her initial application for permanent total disability benefits dated June 19, 2007.

As noted by the Office of Judges, the language contained in West Virginia Code § 23-4-6(j)(5) is unambiguous and clearly states that the onset date for permanent total disability benefits shall be determined using the filing date of a properly completed application for permanent total disability benefits that "results in a finding of permanent total disability". The Office of Judges found that it is undisputed that Ms. Stern filed the application on which her permanent total disability award was based on February 11, 2011. The Office of Judges then determined that pursuant to West Virginia Code § 23-4-6(j)(5), the earliest possible onset date for permanent total disability benefits is February 11, 2011, which is the filing date of the application resulting in a permanent total disability award. The Board of Review reached the same reasoned conclusions in its decision of February 25, 2013. 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: June 27, 2014

CONCURRED IN BY:

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