

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

June 14, 2012

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

LYNDALL W. DUNN, Petitioner

**vs.) No. 100676 (BOR Appeal No. 2043782)
(Claim No. 2006019053)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
PINNACLE MINING COMPANY, LLC, Respondent**

MEMORANDUM DECISION

Petitioner Lyndall W. Dunn, by Reginald Henry, his attorney, appeals the decision of the Board of Review. Pinnacle Mining Company, by Karin Weingart, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated April 26, 2010, in which the Board affirmed a November 10, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 26, 2008, decision that Mr. Dunn failed to meet the whole person impairment threshold of 50% necessary for a permanent total disability award. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition 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. Dunn was employed as an underground coal miner with Pinnacle Mining Company until September 26, 2006. On June 27, 2007, he filed an application for permanent total disability benefits. On February 11, 2008, the Permanent Total Disability Review Board found that Mr. Dunn suffers

from a 47% whole person impairment. Additionally, Mr. Dunn has undergone three independent medical examinations. On August 23, 2007, Dr. Grady found that Mr. Dunn suffers from a 34% whole person impairment. On May 20, 2008, Dr. Carlson found that Mr. Dunn suffers from a 60% whole person impairment. On April 23, 2009, Dr. Craig found that Mr. Dunn suffers from a 33% whole person impairment.

In its Order, the Office of Judges held that Mr. Dunn did not sustain the required amount of whole person impairment necessary for further consideration of a permanent total disability award. Mr. Dunn disputes this finding and asserts, per the opinion of Dr. Carlson, that he did sustain the required amount of whole person impairment necessary for further consideration of a permanent total disability award.

West Virginia Code § 23-4-6(n)(1) (2005) provides :

Other than for those injuries specified in subdivision (m) of this section, in order to be eligible to apply for an award of permanent total disability benefits for all injuries incurred and all diseases, including occupational pneumoconiosis, regardless of the date of last exposure, on and after the effective date of the amendment and reenactment of this section during the year two thousand three, a claimant: (a) Must have been awarded the sum of fifty percent in prior permanent partial disability awards; (b) must have suffered a single occupational injury or disease which results in a finding by the commission that the claimant has suffered a medical impairment of fifty percent; or (c) has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section. Upon filing an application, the claim will be reevaluated by the examining board or other reviewing body pursuant to subdivision (i) of this section to determine if the claimant has suffered a whole body medical impairment of fifty percent or more resulting from either a single occupational injury or occupational disease or a combination of occupational injuries and occupational diseases or has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section.

The Office of Judges noted that the Permanent Total Disability Review Board and two independent medical examiners found that Mr. Dunn sustained less than the required 50% whole person impairment total necessary for further consideration of a permanent total disability award. The Office of Judges found that the record indicates that many of Mr. Dunn's symptoms are due to degenerative changes rather than work-related injuries. Finally, the Office of Judges found the report of Dr. Carlson, on which Mr. Dunn relies, is unreliable and unpersuasive based upon his inclusion of non-work-place injuries in his impairment rating, and the inability of a subsequent independent

medical examination to substantiate his findings. The Board of Review reached the same reasoned conclusion in its decision of April 26, 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 decision of the Board of Review is affirmed.

Affirmed.

ISSUED: June 14, 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