

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**PAUL E. CONLEY,**  
**Claimant Below, Petitioner**

**vs.) No. 100881 (BOR Appeal No. 2043948)**  
**(Claim No. 2005024487)**

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

**and**

**INDEPENDENCE COAL COMPANY, INC.,**  
**Employer Below, Respondent**

**FILED**

**July 29, 2011**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**MEMORANDUM DECISION**

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 28, 2010, in which the Board affirmed a December 18, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 11, 2008 Order, which granted Mr. Conley a 3% psychiatric permanent partial disability award. The appeal was timely filed by the petitioner, and the West Virginia Office of Insurance Commissioner filed a response. 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 parties' submissions 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.

The Board of Review affirmed the Office of Judge's Order, which affirmed a 3%

psychiatric permanent partial disability award. Mr. Conley argues that he is entitled to an additional 5% over the 3% previously granted based upon the report of Dr. Ahmed Faheem. Mr. Conley submits that there is no credible evidence that calls into question Dr. Faheem's impairment findings. Additionally, to the extent that Dr. Faheem's failure to acknowledge Mr. Conley's symptom magnification or exaggeration is the basis for discrediting Dr. Faheem's report, Mr. Conley argues that Dr. Faheem would have accounted for these findings had they impacted Dr. Faheem's conclusions.

The Office of Judges noted first that both Drs. Faheem and Bobby Miller, whose report forms the basis of Mr. Conley's 3% award, concurred on a diagnosis of dysthymic disorder. (Dec. 18, 2009 Office of Judges Order, p.4.) The psychological testing conducted by each psychiatrist also revealed symptom exaggeration or malingering. *Id.* Yet, Dr. Miller was the only evaluator who acknowledged and referenced this in computing psychiatric impairment secondary to the compensable condition. *Id.* In some instances, Dr. Faheem's testing revealed greater evidence of symptom exaggeration or malingering, but Dr. Faheem failed to so much as acknowledge this in determining an impairment rating. *Id.* Accordingly, Dr. Faheem's report was not accorded determinative evidentiary weight, and the Office of Judges affirmed the grant of a 3% psychiatric permanent partial disability award. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision dated June 28, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the grant of a 3% psychiatric permanent partial disability award secondary to Mr. Conley's compensable injury is affirmed.

Affirmed.

ISSUED: July 29, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Menis E. Ketchum

Justice Thomas E. McHugh

Justice Brent D. Benjamin, disqualified