

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

GARY D. STEPP,
Claimant Below, Petitioner

vs.) No. 100889 (BOR Appeal No. 2043424)
(Claim No. 960016546)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

HIGH POWER ENERGY,
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 14, 2010, in which the Board reversed a July 22, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's May 8, 2007 Order, which denied Mr. Stepp's request for a permanent total 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 Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. 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 reversed the Office of Judge's Order, which granted Mr. Stepp

a permanent total disability award. Mr. Stepp argues that he has been rendered permanently and totally disabled by his numerous work-related injuries, which resulted in a total grant of 56.91% in permanent partial disability awards. The last work-related injury suffered by Mr. Stepp occurred on October 4, 1995. Mr. Stepp points to the report of Dr. Bruce A. Guberman, which concluded that he is permanently and totally disabled for all types of employment as a result of his compensable injuries. Mr. Stepp also argues that the Board of Review failed to consider evidence gathered following the date on which he petitioned for a permanent total disability award, July 9, 2002.

In reversing the Office of Judges, the Board of Review noted that Dr. Prasadarao Mukkamala evaluated Mr. Stepp on December 10, 1996. (June 14, 2010 Board of Review Order, p.2.) Dr. Mukkamala found that Mr. Stepp is capable of working at a light category work level. Mr. Stepp's psychological conditions were also found by Dr. Charles Weise to not be an impediment to retraining activities or returning to work. *Id.*

Regarding Dr. Guberman's report, the Board of Review noted that this evaluation occurred nine and one half years following Mr. Stepp's compensable injury. *Id.* at 3. During the intervening time period, Mr. Stepp refused to participate in vocational rehabilitation services on at least two occasions. *Id.* This is in spite of earlier findings that prompt participation in vocational rehabilitation services could return Mr. Stepp to the workforce. Thus, the Board of Review discounted Dr. Guberman's findings and concluded that Mr. Stepp has not been rendered permanently and totally disabled by his compensable injuries and denied his request for a permanent total disability award.

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 so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. Therefore, the denial of petitioner's request for a permanent total disability award is affirmed.

Affirmed.

ISSUED: July 29, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum