

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

RODNEY L. MILLER,
Claimant Below, Petitioner

August 5, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101008 (BOR Appeal No. 2043965)
(Claim No. 2003015042)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

EQUITABLE RESOURCES, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated July 8, 2010, in which the Board reversed a December 29, 2009, Order of the Workers' Compensation Office of Judges and reinstated the claim administrator's Order granting 10% permanent partial disability. In its Order, the Office of Judges reversed the claims administrator's Order and granted Mr. Miller 28% permanent partial disability. The appeal was timely filed by the petitioner and a response was filed by Equitable Resources, Inc. 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, response, 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. Miller asserts the Board of Review erred in reversing the Office of Judges Order granting him 28% permanent partial disability and reinstating the claim administrator's Order granting 10% permanent partial disability. In support, Mr. Miller asserts the independent medical examination performed by Dr. Victor Poletajev is dispositive in determining the appropriate permanent partial disability despite Dr. Poletajev's report conflicting with other examining physicians. Equitable Resources, Inc. asserts the Board of Review properly determined Mr. Miller was entitled to a 10% permanent partial disability award. The independent medical examinations of Drs. Paul Bachwitt, A.E. Landis, and Saghir R. Mir, indicate Mr. Miller's compensable injuries are not as debilitating as indicated in Dr. Poletajev's report.

In its Order reversing the claim administrator's Order granting 10% permanent partial disability, the Office of Judges considered the reports of Drs. Poletajev and Landis in determining the appropriate permanent partial disability award for Mr. Miller. In support of its Order granting Mr. Miller 28% permanent partial disability, the Office of Judges determined Dr. Poletajev placed Mr. Miller in Category II under Rule 20 with Dr. Landis placing Mr. Miller in Category III under Rule 20. (December 29, 2009 Office of Judges Order, p. 5). It further held that "[b]ased upon a preponderance of the evidence, the report of Victor Poletajev, D.C. dated March 17, 2008 is the report upon which the permanent partial disability award should be based." *Id.* As a result, the Office of Judges determined Mr. Miller was entitled to an additional award of 18% permanent partial disability based upon the report of Dr. Poletajev. The Board of Review determined the Office of Judges erred in granting Mr. Miller an award of 28% permanent partial disability and concluded Mr. Miller was entitled to the claim administrator's previous award of 10% permanent partial disability. (July 8, 2010 Board of Review Order, p. 3). The Board of Review found that Dr. Landis set forth objective findings related to the cervical and lumbar spine and made specific Table citations from the AMA Guides, Fourth Edition; properly applied Rule 20-VII guidelines; and held this report to be relevant, credible, material, and reliable. *Id.*, pp. 2-3. It then reversed the Office of Judges and reinstated the Order of the claims administrator granting Mr. Miller 10% permanent partial disability.

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 is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, petitioner's request for reinstatement of the Office of Judges Order granting 28% permanent partial disability is denied and the Order of the Board of Review is affirmed.

Affirmed.

ISSUED: August 5, 2011

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Margaret L. Workman