

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

ROGER L. HARRIS, Petitioner

January 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**vs.) No. 101060 (BOR Appeal No. 2044033)
(Claim No. 960050136)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
PATRIOT MINING COMPANY, INC., Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated July 28, 2010, in which the Board reversed a December 23, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's denial of Mr. Harris' request for a permanent total disability evaluation. The appeal was timely filed by the petitioner and a response was filed by the Office of Insurance Commissioner. 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 briefs, and the record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Mr. Harris suffered severe and extensive burns resulting from spilled hot ash. On December 2, 1997, Mr. Harris received an initial 30% permanent partial disability award for his physical injuries, and later received an additional 8% psychiatric permanent partial disability award. Thereafter, on March 12, 2008, Mr. Harris received a 15% permanent partial disability award. Mr. Harris then sought a reopening of the claim for consideration of permanent total disability benefits. The claims administrator denied the request reasoning Mr. Harris submitted his application outside the applicable statute of limitations.

This denial for referral to the Permanent Total Disability Board was considered by the Office of Judges. It held this claim first arose after the 1995 statutory amendments, therefore, a threshold (40% or 50%) must be met for permanent total disability applications. (December 23, 2009, Office of Judges Order, pp. 3-4). Further, pursuant to W. Va. Code § 23-4-6(n)(I), there is clear contemplation that consideration of more than one injury is possible to meet the requisite threshold. *Id.* Mr. Harris was incapable of meeting this threshold until the additional 15% permanent partial disability award issued by the Board of Review on March 13, 2008. *Id.* Therefore, the Office of Judges held Mr. Harris timely filed his application for permanent total disability consideration and is entitled to a referral to the interdisciplinary Examining Board pursuant to W. Va. Code § 23-4-6. *Id.*

The Board of Review reversed the Office of Judges and held Mr. Harris' application for permanent total disability benefits is barred for consideration by the five year statute of limitations contained in W. Va. Code § 23-4-16. The Board found Mr. Harris was initially granted a permanent partial disability award on December 2, 1997, and the application for permanent total disability consideration was not filed until May 1, 2009, well outside the applicable statute of limitations period.

Pursuant to W. Va. Code § 23-4-6(n)(1)(A), "in order to be eligible to apply for an award of permanent total disability benefits for all injuries incurred and all diseases...a claimant: (A) Must have been awarded the sum of fifty percent in prior permanent partial disability awards." Once an application is filed, the claim will be reevaluated by the examining board or other reviewing body to determine if the claimant has suffered a whole body impairment of fifty percent or more resulting from either a single occupational injury or a combination of occupational injuries. *Id.*

W. Va. Code R. § 85-5-3.3 further provides "a claim will not be re-opened for PTD consideration unless the Application has been filed within five years of the date of closure of the claim, or within five (5) years of the date of the initial PPD, whichever is applicable as required by West Virginia Code Section 23-4-16." West Virginia Code § 23-4-16 provides for all modifications to awards must be made within five years of the applicable statute of limitations.

Mr. Harris received an initial award of permanent partial disability on December 2, 1997, however, the threshold for permanent total disability consideration was not met until May 1, 2009, well outside the applicable statute of limitations. The evidence establishes Mr. Harris attempted on several occasions to obtain a permanent partial disability evaluation for

lung scarring following his compensable injuries.¹ The requested evaluation did not occur until 2006, when the Office of Judges authorized the same.

Mr. Harris attempted to obtain an additional permanent partial disability award for lung scarring within the applicable statute of limitations period and was unable to do so. The fact that the application occurred outside the applicable statute of limitations does not defeat Mr. Harris' application for permanent total disability consideration. The Board of Review clearly erred in concluding Mr. Harris' application for permanent total disability is barred by the applicable statute of limitations. Therefore, the Court hereby reverses the Board of Review and remands this matter for further proceedings. Mr. Harris is entitled to a referral for a permanent total disability evaluation.

Reversed and Remanded.

ISSUED: January 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Robin J. Davis

¹Mr. Harris' attorney submitted letters for further evaluation on March 16, 1998; June 22, 1999; September 15, 1999; and August 26, 2004. The claims administrator did not authorize the request for evaluation by a pulmonary specialist until the Office of Judges ordered the referral on March 10, 2006. Thereafter, Mr. Harris was evaluated and it was determined he suffers from a 15% impairment for lung scarring which is directly attributable to his compensable injuries.