

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

JERRY A. COCHRAN,
Claimant Below, Petitioner

August 2, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101103 (BOR Appeal No. 2044076)
(Claim No. 2008016217)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
Commissioner Below, Respondent

and

EIMORS CONSTRUCTION, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated August 9, 2010, in which the Board affirmed an February 1, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the Claims Administrator's January 13, 2009 order denying a permanent partial disability award. The appeal was timely filed by the petitioner and a response was filed by the Employer. 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.

The Office of Judges held the claimant was not entitled to any award of permanent partial disability for residual impairment in relation to the compensable injury. Mr. Cochran argues that he is not required to prove the exclusion of all other possible causes between the injury and the employment. Additionally, he argues that because there were no range of motion studies prior to Dr. Guberman's report, it was wrong to attribute the impairment to the previous injury.

In its Order affirming the denial of permanent partial disability, the Office of Judges found the claimant failed to sustain the burden of proof supporting a permanent partial disability award. (February 1, 2010 Office of Judges Order, p.6). It noted the evaluator, in finding the claimant was entitled to a 5% permanent partial disability award, relied on Mr. Cochran's representation of no prior injuries. *Id.* Upon the information of the recent prior injury, Dr. Guberman related the impairment to the prior injury, relying on a physician note just three weeks prior describing the same symptoms of the work-related injury. *Id.* at p. 3. The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision on August 9, 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 is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner's request for permanent partial disability is affirmed.

Affirmed.

ISSUED: August 2, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING BY:

Justice Menis E. Ketchum