

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

JAMES R. SMITH, Petitioner

November 10, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101170 (BOR Appeal No. 2044081)
(Claim No. 2002034348)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
RHINO MINING, INC., et al., Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated August 19, 2010, in which the Board reversed a January 12, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the Claims Administrator's August 28, 2007, Order denying the petition for permanent total disability. The appeal was timely filed by the petitioner and a response was filed by the Office 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 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.

In its order the Board of Review found the preponderance of the evidence supported the Permanent Total Disability Reviewing Board's findings. Mr. Smith argues that the reports of Dr. Mukkamala and Dr. Landis are not the reliable evidence of the record. He opines that because there was no definite impairment resulting from pre-existing conditions, both physicians were incorrect in apportioning some of the impairment to such conditions. There were three medical reports submitted: Dr. Guberman's report finding the claimant at

69% whole person impairment; Dr. Mukkamala's report finding the claimant at 15% whole person impairment not including occupational pneumoconiosis or hearing loss impairment; and Dr. Landis's report finding the claimant at 11.5% but also not including impairment for occupational pneumoconiosis or hearing loss. Both Dr. Mukkamala and Dr. Landis believed some of the back and neck impairment was attributable to degenerative changes and apportioned the impairment accordingly.

The Board of Review in its Order reversing the Office of Judge's Order, noted the Permanent Total Disability Reviewing Board's finding that Dr. Mukkamala's evaluation was reliable and credible along with the most accurate and current evaluation. (August 19, 2010, Board of Review Order p. 5). The Board of Review also noted, in response to the apportionment issue, that each of the back injuries was quite minor and the claimant continued to work even after the latest back injury. *Id.* at p. 2. It further noted that the petitioner was not awarded permanent partial disability for the back or neck injuries, furthering the Permanent Total Disability Reviewing Board's acceptance of Dr. Mukkamala's apportionment of impairment. *Id.* at p. 5.

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 August 19, 2010, Board of Review Order is affirmed.

Affirmed.

ISSUED: November 10, 2011

CONCURRED IN BY:

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Margaret L. Workman

Justice Menis E. Ketchum