

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

LINDSEY CROCKETT WHITED, Petitioner

November 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101245 (BOR Appeal No. 2044204)
(Claim No. 2005202955)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ARACOMA COAL COMPANY, INC., Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated September 1, 2010, in which the Board affirmed a March 1, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 4, 2009, decision that Mr. Whited is not entitled to a permanent partial disability award for his right knee injury. 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.

In its Order, the Office of Judges held that Mr. Whited does not have a permanent partial disability resulting from his compensable knee injury. Mr. Whited disputes this finding and asserts, per the opinion of Dr. Poletajev, that he is entitled to a 4% permanent partial disability award as a result of his compensable knee injury.

Specifically, the Office of Judges found that, of the two independent medical evaluations in the instant case, the opinion of Dr. Grady is more persuasive than the opinion of Dr. Poletajev. The Office of Judges based this finding upon the fact that Dr. Grady is a medical doctor, while Dr. Poletajev is a chiropractic physician, and the diagnosis and treatment of knee injuries is within the expertise of a medical doctor, not a chiropractic physician. Laying this fact aside, the Office of Judges also found no explanation for Dr. Poletajev's report of a decreased range of motion in Mr. Whited's knee, when Dr. Grady reported that Mr. Whited had a normal range of motion. Finally, the Office of Judges noted that Mr. Whited represented to Dr. Grady that, prior to the examination, he had forgotten about his compensable knee injury, but that Dr. Poletajev recommended a neuropsychological evaluation for depression arising from the compensable knee injury. The Board of Review reached the same reasoned conclusion in its decision of September 1, 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 benefits is affirmed.

Affirmed.

ISSUED: November 15, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum

Justice Brent D. Benjamin Disqualified