

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 16, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

KATHY P. BLANKENSHIP, Petitioner

vs.) No. 101247 (BOR Appeal No. 2044210)
(Claim No. 2005032926)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
PINNACLE MINING COMPANY, LLC, Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated September 1, 2010, in which the Board affirmed a February 24, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of an additional award of 2% permanent partial disability. 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 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 Board of Review held Ms. Blankenship was not entitled to an additional award of 2% permanent partial disability as the relevant medical records do not support the award. Ms. Blankenship asserts she is entitled to an additional award of 2% permanent partial disability based upon the independent medical examination of Dr. Clifford Carlson who opined she suffers from 7% disability related to her thoracic spine injury. Further, the 5% permanent partial disability was granted based upon an error in Dr. A. E. Landis' IME report,

wherein the report referenced a prior lumbar spine MRI showing degenerative changes. The Office of Insurance Commissioner asserts Ms. Blankenship was fully and completely compensated with her prior 5% award and Dr. Landis properly apportioned the recommended impairment based upon the existence of pre-existing degenerative changes revealed in the lumbar spine MRI.

In its Order, the Office of Judges found Ms. Blankenship received full compensation for her thoracic spine injury with the award of 5% permanent partial disability. (February 24, 2010 Office of Judges Order, p. 7). It further held an additional award would be improper when the vertebral levels were clearly affected by pre-existing degenerative changes that did not occur as a result of the compensable injury. *Id.* “The fact that the claimant had a previous MRI of her thoracic spine a month before the compensable injury indicates she was having considerable problems with her thoracic spine.... Obviously, the claimant must have been seeking treatment for her back prior to the date of injury.” *Id.* It further held Dr. Landis’ apportionment related to pre-existing degenerative changes was appropriate. *Id.*, p. 8. The Office of Judges, too, found no basis for an additional award of permanent partial disability or for disputing the Claims Administrator’s findings. The Board of Review reached the same reasonable conclusion in affirming the Office of Judges 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 Court affirms the Board of Review order finding Ms. Blankenship was fully compensated for her thoracic spine injury with the 5% permanent partial disability award.

Affirmed.

ISSUED: December 16, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh