

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

WILLIAM E. KENDRICK, Petitioner

February 15, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101253 (BOR Appeal No. 2044304)
(Claim No. 2003047936)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
GAPCO MINING COMPANY, Respondent

MEMORANDUM DECISION

The Petitioner, William E. Kendrick, by John C. Blair, his attorney, appeals the Board of Review order denying the request for 10% permanent partial disability as set forth in Dr. Riaz Uddin Riaz's report for Mr. Kendrick's diagnosed depression. The Office of Insurance Commissioner, by its attorney, Laura Young, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated September 29, 2010, in which the Board affirmed a March 12, 2010, order of the Workers' Compensation Office of Judges. In its order, the Office of Judges affirmed the claims administrator's order granting Mr. Kendrick a 2% permanent partial disability award for depression. 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.

The Board of Review found Mr. Kendrick suffered from a 2% impairment related to his compensable depression. Mr. Kendrick disputes this finding, asserting Dr. Riaz Uddin Riaz evaluated him and found 10% impairment related to the psychiatric impairment. Further, the findings contained in Dr. Riaz's report were improperly discounted due to there

being no evidence of a psychological evaluation along with the psychiatric evaluation. Mr. Kendrick asserts when Dr. Riaz's report is considered pursuant to the preponderance of the evidence standard he is entitled to an additional award of permanent partial disability. Dr. Ahmed D. Faheem also conducted a psychiatric evaluation of Mr. Kendrick and found major affective disorder and reduced the recommended impairment to 2% for non-injury related contributing factors.

The Office of Judges held Mr. Kendrick was appropriately granted a 2% permanent partial disability award for his psychiatric condition. (March 12, 2010, Office of Judges Order, p. 4). "According to Title 85-20-12, independent psychiatric evaluations must include psychological evaluations and testing." *Id.* It found Dr. Riaz failed to reference any psychological testing, resulting in a finding that Dr. Riaz's report was less thorough than the report of Dr. Faheem. As a result, the Office of Judges found Dr. Faheem's report opining 2% impairment is the most detailed evidence of record and the most persuasive and convincing. Therefore, the Office of Judges held Mr. Kendrick was properly awarded a 2% permanent partial disability award, and the Board of Review reached this same reasoned conclusion in its September 2, 2010 Order.

The evaluation of psychiatric reports and evidentiary weight placed on each report is influenced by how well it demonstrates that the evaluation was conducted in accordance with the rule and attached exhibits. W. Va. Code R. § 85-20-12.3. The applicable regulation further provides that psychological evaluations and testing must be a part of every initial independent medical evaluation of a claimant to provide a comprehensive view of his mental, intellectual, and personality functioning. W. Va. Code R. § 85-20-12.8.c. Dr. Faheem performed the initial independent medical evaluation and also conducted psychological testing at that time. When Dr. Riaz conducted his subsequent independent medical evaluation additional psychological testing was not conducted, however, Dr. Riaz considered the psychological testing conducted by Dr. Faheem. The requirements of W. Va. Code R. § 85-20-12.8.c were complied with and there are no grounds to afford Dr. Riaz's report less weight for the failure to conduct a separate independent psychological evaluation, when such evaluation is not required under the applicable Rule 20 guidelines.

For the foregoing reasons, we find that the decision of the Board of Review is 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 hereby remands this matter for additional consideration of Dr. Riaz's psychiatric evaluation.

Reversed and Remanded.

ISSUED: : February 15, 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