

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

DAVID E. THOMPSON, Petitioner

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

vs.) No. 101255 (BOR Appeal No. 204403)
(Claim No. 2000052563)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
LOGAN COUNTY BOARD OF EDUCATION,
Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated September 2, 2010, in which the Board affirmed a January 15, 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 6% 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.

Upon review of the relevant medical reports the Board of Review determined Mr. Thompson was granted an award of 2% permanent partial disability, and denied Mr. Thompson's request for an additional award of 6% permanent partial disability. Mr. Thompson argues he is entitled to an additional award of 6% permanent partial disability based upon the report of Dr. Victor Poletajev, who opined Mr. Thompson suffered from a

20% disability due to his compensable right knee injury. On the other hand, the Office of Insurance Commissioner asserts the Office of Judges and Board of Review properly determined the preponderance of the evidence supports the 2% permanent total disability award and Dr. Poletajev's report improperly utilized the AMA Guides, Fourth Edition in reaching his impairment rating.

The Office of Judges found the reports of Dr. A. E. Landis and Dr. Paul Bachwitt to contain the most accurate recommendations regarding Mr. Thompson's impairment. (January 15, 2010 Office of Judges Order, p. 6). Dr. Poletajev's report was found less persuasive since he reported 0 mm of joint space, loss of motion and atrophy which were not found by Dr. Landis and Dr. Bachwitt. *Id.* Accordingly, the preponderance of the evidence demonstrates that Mr. Thompson is entitled to the 2% permanent partial disability award and not the further requested 6% permanent partial disability. *Id.* The Office of Judges, too, found no basis for granting Mr. Thompson's request for an additional award of 6% 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 2, 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 denying Mr. Thompson's request for an additional award of 6% permanent partial disability.

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