

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

GEORGE L. McQUAIN, JR., Petitioner

vs.) No. 101264 (BOR Appeal No. 2043798)
(Claim No. 880042911)

FILED

November 8, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
K-MART CORPORATION, Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated April 26, 2010, in which the Board affirmed an November 2, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 5, 2008, Order, which held that Mr. McQuain, Jr. has been fully compensated by the 6% permanent partial disability award previously granted. The appeal was timely filed by the petitioner, and K-Mart Corporation filed a response. 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 parties' submissions 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 affirmed the Office of Judge's Order, which found Mr. McQuain fully compensated by a prior order granting him a 6% permanent partial disability award. Mr. McQuain argues that he is entitled to a reopening of his case for an additional award, however, due to a progression in his shoulder condition stemming from a 1988 compensable injury.

To obtain a reopening, a claimant must demonstrate "a progression or aggravation in the claimant's condition, or some other fact or facts which were not previously considered

. . . and which would entitle the claimant to greater benefits[.]” W. Va. Code § 23-5-3. The only report not previously considered is that of Johnny Dy, M.D. Dr. Dy found that Mr. McQuain had an additional 2% impairment for a total of 8% impairment; however, Dr. Dy did not reference any tables or explain why he recommended an additional 2% impairment. (Nov. 2, 2009, Office of Judges Order, p. 5.) Accordingly, the Office of Judges found that this report lacked credibility and failed to establish entitlement to any greater permanent partial disability award. *Id.* The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its April 26, 2010, decision.

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 based upon the Board’s material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the holding that Mr. McQuain has been fully compensated by his prior 6% permanent partial disability award is affirmed.

Affirmed.

ISSUED: November 8, 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