

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

MARK J. RANKIN, Petitioner

vs.) No. 101274 (BOR Appeal No. 2044331)
(Claim No. 2001005747)

FILED

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

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
EASTERN ASSOCIATED COAL CORP., LLC,
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 March 31, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's July 8, 2008, Order, which denied Mr. Rankin's request for a permanent total disability award. The appeal was timely filed by the petitioner, and Eastern Associated Coal Corp., LLC 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 denied Mr. Rankin's application for a permanent total disability award. Mr. Rankin argues that he is entitled to a permanent total disability award due to the fact that he has received 63% permanent partial disability awards over the course of his employment. Mr. Rankin also notes that Dr. Edita Milan found 50% impairment, which entitles him to a permanent total disability award.

The Office of Judges noted first that Mr. Rankin's prior permanent partial disability awards, which total 63%, do not independently form a basis for a permanent total disability award. (Mar. 31 2010, Office of Judges Order, p. 6.) Rather, these awards satisfy only the threshold for consideration of a permanent total disability award. *Id.* West Virginia Code § 23-4-6(n)(1) sets forth that, to be eligible for a permanent total disability award, a claimant must first meet one of several alternatives, one of which is receipt of permanent partial disability awards totaling at least 50%. If this step is satisfied, "the claim will be reevaluated by the examining board or other reviewing body pursuant to subdivision (I) of this section to determine if the claimant has suffered a whole body medical impairment of fifty percent or more resulting from either a single occupational injury or occupational disease or a combination of occupational injuries and occupational diseases[.]" *Id.* Following reevaluation, "[i]f the claimant has not suffered whole body medical impairment of at least fifty percent[,]. . . the request shall be denied." *Id.* Accordingly, Claimant's receipt of at least 50% permanent partial disability awards will not alone form the basis for a permanent total disability board.

Moreover, the report upon which Mr. Rankin relies in asserting that he is permanently and totally disabled lacks credibility. Dr. Edita Milan failed to combine the impairment ratings she found for a whole person impairment. (Mar. 31, 2010 Office of Judges Order, p. 6.) Further, Dr. Milan failed to submit the low back evaluation form required by West Virginia Code § 85-20-66.2. *Id.* Dr. Milan also failed to perform her examination utilizing the range of motion model as set forth in the *AMA Guides*, 4th ed. *Id.* Finally, Dr. Milan failed to discuss whether any of the impairment found could be attributable to preexisting or non-compensable conditions that Claimant has, such as degenerative disc disease. *Id.* Thus, the Office of Judges found Dr. Milan's report to be unreliable. *Id.* The Office of Judges found Dr. ChuanFang Jin's report, which found only 30% whole body impairment, to be the most reliable. *Id.* at p. 7. Accordingly, the Office of Judges found that Claimant failed to establish 50% whole person impairment as is necessary for entitlement to a permanent total disability award. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its September 2, 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 denial of Mr. Rankin's application for a permanent total 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 Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum