

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

MARVIN SHAWN BENCH, Petitioner

January 20, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**vs.) No. 101347 (BOR Appeal No. 2044338)
(Claim No. 2009066883)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
SPARTAN MINING COMPANY, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 5, 2010, in which the Board affirmed a March 15, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's February 20, 2009, decision granting Mr. Bench no permanent partial disability award. The appeal was timely filed by the petitioner and a response was filed by the Employer. 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 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.

In its Order reversing the decision of the claims administrator, the Office of Judges held that Mr. Bench is entitled to a 7% permanent partial disability award. Mr. Bench disputes this finding and asserts, per the opinion of Dr. Poletajev, that he is entitled to a total permanent partial disability award of 24%.

The Office of Judges determined that although Dr. Poletajev found that Mr. Bench had a loss of range of motion and radiculopathy in his cervical spine, Dr. Poletajev's report is not reliable because his findings did not exist prior to or after his examination. It then found that Mr. Bench is not entitled to a permanent partial disability award for the cervical spine strain in the instant claim.

The Office of Judges also determined that Dr. Poletajev found evidence of radiculopathy in Mr. Bench's lumbar spine, but because his findings did not exist prior to or after his examination the record indicates that Mr. Bench does not have radiculopathy in his lumbar spine. The Office of Judges then found that the record demonstrates that Mr. Bench does have some loss of range of motion in his lumbar spine as a result of his compensable injury. It was noted that Table 75 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment, Fourth Edition* requires that a claimant demonstrate a medically documented injury, pain, and rigidity associated with none to minimal degenerative changes on structural tests in order to receive a rating of 5% impairment for the lumbar spine. The Office of Judges held that Mr. Bench is entitled to a 7% permanent partial disability award based upon the opinion of Dr. Mukkamala, Table 75, and W. Va. Code R. Table § 85-20-C. The Board of Review reached the same reasoned conclusion in its decision of October 5, 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 decision of the Board of Review is affirmed.

Affirmed.

ISSUED: January 20, 2012

CONCURRED IN BY:

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

Justice Larry V. Starcher, Senior Status Justice sitting by special assignment

DISSENTING:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin disqualified