

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 3, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

CONSOLIDATION COAL COMPANY, Petitioner

**vs.) No. 101348 (BOR Appeal No. 2043891)
(Claim No. 200057662)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ALFRED Z. HARRINGTON, Respondent**

MEMORANDUM DECISION

The Petitioner, Consolidation Coal Company (hereinafter “Consolidation”), by Bradley A. Crouser, its attorney, appeals the Board of Review order granting permanent total disability. The Respondent, Alfred Z. Harrington, did not file a response.

This appeal arises from the West Virginia Workers’ Compensation Board of Review Final Order dated September 21, 2010, in which the Board affirmed a December 7, 2009, Order of the Workers’ Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator’s order granting Mr. Harrington a permanent total disability award.¹ 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.

On March 20, 2003, Mr. Harrington submitted his application for permanent total disability consideration noting he had previously received a total of 53% permanent partial disability awards. The prior independent medical evaluations for Mr. Harrington’s injuries, along with, new evaluations

¹Mr. Harrington filed his application prior to the 2003 amendments, thus, only a showing of 40% impairment was necessary for the claimant to be eligible for permanent total disability consideration.

were considered in determining Mr. Harrington's final whole person impairments for permanent partial disability. The impairment ratings for Mr. Harrington's occupational pneumoconiosis, psychiatric, and hearing loss are not disputed.

The Board of Review held Mr. Harrington is entitled to a permanent total disability award commencing on July 17, 2003, the date of Robert Williams' finding Mr. Harrington incapable of returning to gainful employment. Consolidation asserts the relevant evidence does not support an award of permanent total disability. In support, Consolidation points to the reliance on Dr. Luis Loimil's independent medical evaluation and the improper and undue consideration the report received by the Worker's Compensation Commission Independent Evaluation Board (hereinafter "IEB").

On July 13, 2003, Dr. Clifford Carlson evaluated Mr. Harrington and opined 19% impairment for the right knee, 6% for the left knee, and 12% for the lumbar spine. Dr. Paul K. Forberg evaluated Mr. Harrington on February 10, 2004, and opined 9% right knee impairment, 3% left knee impairment, and 15% lumbar spine impairment. Dr. Prasadarao B. Mukkamala also evaluated Mr. Harrington on June 15, 2004, and opined 7% right knee, 1% left knee, and 15% lumbar spine impairment. A final evaluation was conducted by Dr. Luis Loimil who opined 10% right knee, 8% left knee, and 17% lumbar spine impairment.

During the course of Mr. Harrington's permanent total disability consideration several vocational and functional capacity evaluations occurred. On July 17, 2003, Robert L. Williams performed a vocational evaluation and opined Mr. Harrington is permanently disabled. Thereafter, Hugh C. Murray conducted a functional capacity evaluation. Mr. Murray found several discrepancies during the evaluation which resulted in a recommendation that Mr. Harrington is capable of performing light duty work, lifting up to 25 pounds infrequently, and 10 pounds lifting on a frequent basis. Casey Vass also performed a vocational evaluation at which time Mr. Harrington refused any vocational rehabilitation services; however, Ms. Vass recommended that any potential vocational rehabilitation services include work-conditioning with a possible work-hardening program and return to work with the pre-injury employer.

On February 14, 2005, the IEB issued its Initial Recommendation finding Mr. Harrington had a 38% whole person impairment and failed to meet the required 40% minimal threshold for a permanent total disability award. Afterwards Mr. Harrington submitted a request with the IEB for reconsideration of his whole person impairment rating. On May 23, 2005, the IEB issued a Revised Initial Recommendation and found Mr. Harrington suffers from a 41% whole person impairment and met the required threshold for consideration of a permanent total disability award.

On October 24, 2005, the IEB issued its Final Recommendation which found Mr. Harrington suffers from a combined value of 43% whole person impairment, which impairment rendered Mr. Harrington unable to engage in substantial gainful employment. This Recommendation notes Dr. Loimil, a member of the IEB, properly recused himself and did not participate in the decision-making process. On October 26, 2005, the IEB issued its Protestable Decision wherein it held Mr. Harrington entitled to a permanent total disability award, with an onset date of July 17, 2003, the

date Robert Williams' vocational rehabilitation report finding Mr. Harrington had no rehabilitation potential. This finding was adopted by the Claims Administrator.

Dr. Mohammed Ranavaya conducted a medical review and opined the IEB erred in finding Mr. Harrington suffers from a 43% whole body impairment. Dr. Ranavaya concluded that the IEB's findings were inconsistent with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 4th ed. Dr. Ranavaya found the IEB's reliance on Dr. Loimil's lumbar rating particularly troubling since Dr. Loimil was also a member of the IEB. As a result, Dr. Ranavaya found the IEB appeared to give Dr. Loimil's report great weight and disregarded several credible and reliable reports from other well-qualified physicians. While Dr. Loimil's initial erroneous 20% lumbar spine impairment was corrected to 17%, the IEB incorrectly adopted the 8% left knee impairment rating found in Dr. Loimil's report to find 43% whole person impairment. On February 28, 2007, Mark A. Hileman, conducted a supplemental permanent total disability rehabilitation evaluation in which Mr. Hileman opined Mr. Harrington would not benefit from vocational rehabilitation services and would have no potential for securing any type of employment based upon his assessed residual vocational capabilities.

The Office of Judges considered the evaluation reports, functional capacity evaluations, and vocational rehabilitation records and affirmed the IEB's determination that Mr. Harrington suffers from 43% impairment. Dr. Ranavaya's opinions were given no weight by the Office of Judges, since Dr. Ranavaya did not conduct an evaluation of Mr. Harrington. Dr. Loimil's testimony and objective findings for the left knee impairment were found consistent with Mr. Harrington's surgical intervention for that knee. Further, Dr. Loimil's lumbar spine rating was found to be appropriately corrected from 20% to 17%.

Under the preponderance of the evidence standard, the Office of Judges held the IEB was not clearly wrong in affirming the permanent total disability award. The Office of Judges, too, found no appearance of impropriety regarding Dr. Loimil, since the evidence establishes Dr. Loimil recused himself from participating in the [IEB's] decision. Thus, the Office of Judges affirmed the permanent total disability award with an onset date of July 17, 2003. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges, in its order dated September 21, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the Court affirms the Board of Review order granting Mr. Harrington a permanent total disability award with an onset date of July 17, 2003.

Affirmed.

ISSUED: **May 3, 2012**

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

Justice Brent D. Benjamin, Not Participating