

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

ROBERT W. VINCENT, Petitioner

March 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101462 (BOR Appeal No. 2044439)
(Claim No. 2003020460)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
CONSOLIDATION COAL CO., Respondent

MEMORANDUM DECISION

Petitioner Robert W. Vincent, by M. Jane Glauser, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying permanent total disability benefits. Consolidation Coal Company, by Edward George, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 18, 2010, in which the Board affirmed a March 24, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the Claims Administrator's May 26, 2009, denial of permanent total disability benefits. 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.

The Board of Review affirmed the holding that the preponderance of the evidence did not establish that the petitioner was entitled to permanent total disability benefits. The petitioner argues that the Permanent Total Disability Review Board was incorrect in its evaluation of the claimant's whole person impairment and thus, the Office of Judges was incorrect in relying upon it. He also asserts that the threshold has been met and it was a fatal flaw to exclude an occupational pneumoconiosis impairment.

In its Order affirming the Claims Administrator's denial of permanent total disability benefits, the Office of Judges noted the lack of reliable and credible evidence demonstrating the petitioner had met the statutory threshold. It noted that while the petitioner argued he suffered from occupational pneumoconiosis, there was no evidence of a claim for this occupational disease. Moreover, the Office of Judges found the preponderance of the evidence supported the fact that the Permanent Total Disability Review Board had correctly evaluated the petitioner. The Board of Review noted that even if a higher impairment for hearing loss had been accepted, the petitioner still did not meet the threshold. The Board of Review reached the same reasoned conclusions in its decision of October 18, 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 Board of Review Order is affirmed.

Affirmed.

ISSUED: March 22, 2012

CONCURRED IN BY:

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum