

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 7, 2012

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

HALSEY L. ROBERTS, Petitioner

**vs.) No. 101470 (BOR Appeal No. 2044150)
(Claim No. 980046604)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
BOTTOMLINE MANAGEMENT, INC.,
Respondent**

MEMORANDUM DECISION

Petitioner Halsey L. Roberts, by John Blair, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying permanent total disability benefits. The West Virginia Office of Insurance Commissioner, by Gary Mazezka, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 19, 2010, in which the Board reversed a January 25, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's May 8, 2007, Order denying Mr. Roberts's petition for 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 a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Mr. Roberts worked as a mine foreman, section boss, roof bolter, and laborer. During that time he suffered various compensable injuries, including psychiatric impairment due to the compensable injuries. He filed for permanent total disability benefits on November 19, 2001. The claims administrator denied the application, but the decision was subsequently reversed by the Office

of Judges on June 29, 2005, and referred to the Permanent Total Disability Review Board for a determination of entitlement to permanent total disability benefits. Based on the Permanent Total Disability Review Board's final recommendations, the claims administrator denied the application a second time because the claimant could return to work at a sedentary to light physical demand level.

In reversing the claims administrator's denial of permanent total disability benefits, the Office of Judges considered the numerous evaluations in the record, and concluded that Mr. Roberts was entitled to permanent total disability benefits. The Office of Judges noted, as found by the Permanent Total Disability Review Board, that Mr. Roberts received a 20% permanent partial disability award for a psychiatric condition solely related to the compensable injury. It also noted that Dr. Kropac found Mr. Roberts was unable to fully perform range of motion of the fingers of the right hand, unable to fully bend over, and unable to do household chores he had previously performed. The Office of Judges also noted that a psychiatric evaluation concluded he was not able to perform sedentary jobs which require complicated decision making.

Rehabilitation reports were considered by the Permanent Total Disability Review Board and the Office of Judges. While one evaluator noted that Mr. Roberts put out less than full effort, several other evaluators concluded that he would be unable to return to work. The Permanent Total Disability Review Board acknowledged the report limiting Mr. Roberts's ability to perform complicated decision making, yet agreed with Mark Hileman that due to Mr. Roberts's past experience in supervisory roles and management he could return to work. The Office of Judges noted the Permanent Total Disability Review Board did not identify the jobs it believed Mr. Roberts could perform.

In reaching the conclusion that Mr. Roberts was permanently and totally disabled, the Office of Judges noted several influencing factors. It noted that given the cognitive abilities, and psychiatric limitations, the jobs available to Mr. Roberts could well be complicated. Further, the Office of Judges noted that Mr. Roberts is right hand dominant and the most serious injury is an injury he suffered to the right hand. Ultimately, the Office of Judges concluded that Mr. Roberts does not possess the skills or abilities for either of the jobs identified by vocational consultant Michael Price.

The Board of Review reversed the Office of Judges Order and found that the preponderance of the evidence supports the Permanent Total Disability Review Board's final recommendation that Mr. Roberts is able to engage in substantial gainful activity. This Court disagrees and finds that the preponderance of the evidence supports a finding that Mr. Roberts is unable to return to substantial gainful activity.

Mr. Roberts is permanently and totally disabled as he is unable to engage in substantial gainful activity. The Board of Review clearly erred in finding the Permanent Total Disability Review Board's finding were supported by a preponderance of the evidence. Therefore, the Court reverses

the Board of Review Order and remands with instruction to reinstate the January 25, 2010, Office of Judges Order. Mr. Roberts is entitled to permanent total disability benefits.

Reversed and Remanded.

ISSUED: May 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Justice Robin J. Davis

Justice Brent D. Benjamin, Not Participating