

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 24, 2012

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

HENRY W. ASTON, Petitioner

**vs.) No. 101482 (BOR Appeal No. 2044253)
(Claim No. 2004052243)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
CONSOLIDATION COAL COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner, Henry W. Aston, by M. Jane Glauser, his attorney, appeals the Board of Review order granting a 5% permanent partial disability award. Consolidation Coal Company by Edward M. George, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated October 21, 2010, in which the Board affirmed a February 12, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's Order granting Mr. Aston 5% permanent partial disability award for a thoracic spine injury. 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, response, 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 held Mr. Aston was properly awarded 5% permanent partial disability for his thoracic spine injury based upon the September 26, 2008, independent medical evaluation of Dr. Bruce A. Guberman. Mr. Aston asserts the Board of Review and Office of Judges erred in failing to consider a revised, September 24, 2009, independent medical evaluation report from Dr. Guberman finding 7% impairment to the thoracic spine.

The Office of Judges held Mr. Aston submitted a large amount of medical records, mostly treatment notes and requests for authorization of treatment, most of which predate Dr. Guberman's September 24, 2008, examination of Mr. Aston, and were considered by Dr. Guberman at the time of his examination. It held none of the records demonstrate that [Mr. Aston] was not at a maximum degree of medical improvement at the time of the aforesaid examination. It further found, at the time Dr. Guberman evaluated Mr. Aston, the injury was four years old and it was unlikely Mr. Aston's condition would improve with further treatment. Additionally, the Office of Judges held Dr. Guberman's September 24, 2009, report was untimely filed and did not consider the report. It further held a subsequent October 7, 2009, claims administrator Order addressing the September 24, 2009, Dr. Guberman report remained in litigation at the time of the Office of Judges order. The Office of Judges, too, found no basis for granting Mr. Aston's request for an additional 2% permanent partial disability for disputing the claims administrator's order. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of October 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 finds the Board of Review did not err in denying Mr. Aston's request for an additional 2% permanent partial disability for his thoracic spine injury.

Affirmed.

ISSUED: April 24, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh