

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 24, 2012

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

DANNY P. GIBSON, Petitioner

**vs.) No. 101515 (BOR Appeal No. 2044544)
(Claim No. 2007213520)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
EASTERN ASSOCIATED COAL CORPORATION, LLC,
Respondent**

MEMORANDUM DECISION

Petitioner, Danny P. Gibson, by John C. Blair, his attorney, appeals the Board of Review order granting a 12% permanent partial disability award for his thoracic and lumbar spine injuries. Eastern Associated Coal Corporation, LLC, by Robert J. Busse, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated November 8, 2010, in which the Board affirmed an April 29, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's order granting Mr. Gibson a 12% permanent partial disability award. 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.

Mr. Gibson asserts under the preponderance of the evidence standard he is entitled to an additional 2% permanent partial disability award. The Office of Judges erred in failing to properly consider Dr. Bruce A. Guberman's report finding 14% impairment and in adopting the findings contained in Dr. A. E. Landis' report. The Board of Review held the preponderance of the evidence supports the 12% permanent partial disability award.

The Office of Judges considered Dr. Landis' and Dr. Guberman's reports and affirmed the claims administrator's 12% permanent partial disability award. Dr. Landis was found to be the only evaluating physician to account for pre-existing degenerative disc disease in accordance with W. Va. Code § 23-4-9b. It further held Dr. Landis obtained x-rays at the time of evaluation and considered the findings in rating Mr. Gibson's impairment. *Id.* Dr. Guberman's report was found to contain no indication that he examined any x-ray studies or obtain his own x-ray studies. Therefore, the Office of Judges, too, found no basis 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 November 8, 2010.

In determining the appropriate award for an injury received for a compensable injury the evidence must be considered under the preponderance of the evidence standard. This requires a weighing of all the evidence regarding the issue and when there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted. West Virginia Code § 23-4-1g(a). Mr. Gibson disputes the Office of Judges' finding that he is entitled to a 12% permanent partial disability award due to Dr. Guberman's failure to apportion for degenerative changes. According to West Virginia Code of State Rules § 85-20-66.1, the evidentiary weight to be afforded a report will be determined by how well the report demonstrates that the evaluation and examination that it memorializes were conducted in accordance with the applicable Guides and that the opinion with regard to the degree of permanent whole body medical impairment suffered by an injured worker was arrived at and composed in accordance with the requirements of the applicable Guides.

The Office of Judges fully considered the reports submitted by Dr. Landis and Dr. Guberman in determining to afford greater evidentiary weight to Dr. Landis' report. Dr. Guberman's report was appropriately afforded less evidentiary weight since Dr. Guberman failed to apportion for the pre-existing degenerative changes as set forth in West Virginia Code § 23-4-9b.

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 denying Mr. Gibson's request for an additional 2% permanent partial disability award.

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