

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

CHARLES DELBERT, Petitioner

July 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0030 (BOR Appeal No. 2044754)
(Claim No. 990051738)

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

MEMORANDUM DECISION

Petitioner, Charles Delbert, by his attorney, M. Jane Glauser, appeals the Board of Review Order denying a reopening request for additional temporary total disability benefits. 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 December 8, 2010, in which the Board affirmed a June 3, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of Mr. Delbert's reopening application for additional temporary 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.

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. Delbert suffered a compensable injury when he struck his head and suffered a cervical disc displacement and neck sprain. Following the injury, Mr. Delbert continued to receive temporary total disability benefits up to the date of retirement. At that time, the claims administrator entered an order discontinuing temporary total disability benefits based upon the language of West Virginia Code of State Rules § 85-1-5.2.

Mr. Delbert asserts he is entitled to continued temporary total disability benefits under West Virginia Code of State Rules § 85-1-5.2 which provides: this “does not preclude payments of benefits otherwise due a claimant if the retiree has returned to employment and suffers a compensable injury or payment of benefits if the compensable injury causes the individual to retire.” Accordingly, Mr. Delbert asserts the Office of Judges improperly focused on the date his reopening application was filed and dismissed the language of the rule allowing for the continuance of temporary total disability benefits. Dr. Thomas Wack completed the reopening application and opined Mr. Delbert retired as a result of his compensable injuries.

The Office of Judges considered the language of West Virginia Code of State Rules § 85-1-5.2 and found Mr. Delbert was not entitled to additional temporary total disability benefits following his retirement since the application for benefits was not received prior to Mr. Delbert’s retirement. The Office of Judges further held it is undisputed that Mr. Delbert is retired from his employment with Consolidation Coal Company. The petition for reopening was dated August 11, 2009, which occurred after the retirement date of June 20, 2009. As a result, the Office of Judges held the law is clear, due to Mr. Delbert’s retirement, he is no longer entitled to received additional temporary total disability benefits beyond the retirement date. The Office of Judges, too, found no basis reopening Mr. Delbert’s claim for additional temporary total disability benefits or for disputing the claims administrator’s findings. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in it decision of December 7, 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 denying Mr. Delbert’s reopening application for temporary total disability benefits.

Affirmed.

ISSUED: July 26, 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