

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

PERFORMANCE COAL COMPANY, Petitioner

July 20, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0139 (BOR Appeal No. 2044767)
(Claim No. 2001037787)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
TRUMAN BAYS, Respondent

MEMORANDUM DECISION

Petitioner, Performance Coal Company (hereinafter “Performance”), by Paul E. Pinson, its attorney, appeals the Board of Review Order remanding this claim for further consideration by the Permanent Total Disability Review Board (hereinafter “PTD Review Board”). Truman Bays, by John H. Shumate Jr., his attorney, filed a timely response.

This appeal arises from the West Virginia Workers’ Compensation Board of Review Final Order dated December 23, 2010, in which the Board affirmed a June 23, 2010, Order of the Workers’ Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator’s finding that Mr. Bays does not meet the minimum threshold for further permanent total disability consideration and remanded this matter for further consideration of Mr. Bays’s claim. 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.

The Board of Review held Mr. Bays meets the first threshold for consideration of a permanent total disability award and remanded this claim for further proceedings before the PTD Review Board. Performance asserts the relevant evidence establishes Mr. Bays’s prior 40% occupational pneumoconiosis award was appropriately reduced to a 20% impairment based upon the

opinion of Dr. Gregory J. Fino and Dr. Joseph J. Renn III. According to Performance, this 20% impairment for occupational pneumoconiosis combined with an 11% orthopedic impairment falls well short of the required 40% for additional permanent total disability consideration.¹

Mr. Bays was awarded 40% permanent partial disability for occupational pneumoconiosis on July 15, 1993. Thereafter, on August 19, 2003, Mr. Bays was awarded social security disability benefits largely as a result of the occupational pneumoconiosis diagnosis and subsequent impairment finding. On April 12, 2009, the PTD Review Board issued its Initial Recommendation denying further consideration of Mr. Bays's permanent impairment and finding Mr. Bays failed to meet the minimum threshold for further consideration for permanent total disability. The claims administrator then denied Mr. Bays's permanent total disability award application based upon the PTD Review Board's initial recommendation.

Dr. Joseph J. Renn III conducted a medical records evaluation on December 27, 2009, and opined Mr. Bays's 2001 pulmonary function testing showed bronchoreversible obstructive ventilatory deficit. Dr. Renn further opined occupational pneumoconiosis is not a reversible disease and only 15% of Mr. Bays's impairment is attributable to occupational pneumoconiosis. On January 7, 2010, Dr. Gregory J. Fino, M.D. also conducted a medical records review and opined the prior 1993 and 2001 x-ray studies failed to establish any evidence of abnormalities consistent with occupational pneumoconiosis. Further, the 2001 pulmonary function testing showed improvement on the FVC and FEV1 after administration of a bronchodilator. Thus, Dr. Fino only attributed a minority of Mr. Bays's impairment to occupational pneumoconiosis and agreed with the PTD Review Board's 20% impairment findings.

Pursuant to West Virginia Code § 23-4-8c(d) (2005), the Office of Judges held considerable deference is afforded the findings of the Occupational Pneumoconiosis Board unless the Board's decision is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record. Further, the Office of Judges held the PTD Review Board erred in considering Mr. Bays's impairment pursuant to Chapter 5, "The Respiratory System," American Medical Association's, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). Dr. Renn's opinion was afforded less weight because the report did not document the evidence supporting the 15% impairment and Dr. Renn did not refer to West Virginia Code of State Rules § 85-20-A. Dr. Fino's report was also found less persuasive since it did not set forth any impairment rating for the occupational pneumoconiosis nor how such impairment was determined. Mr. Bays's pre- and post-bronchodilator FEV1/FVC ratio of 48 was also not discussed by either Dr. Renn or Dr. Fino. Thus, the Office of Judges held the relevant evidence establishes Mr. Bays is entitled to the full 40% occupational pneumoconiosis award and reversed this claim for further consideration of Mr. Bays application for permanent total disability. The Board of Review reached the same reasoned conclusion in its Order of December 23, 2010.

¹Mr. Bays filed his claim prior to the 2003 amendments and is only required to meet a 40% threshold for permanent total disability.

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 remanding this matter for further proceedings before the PTD Review Board.

Affirmed.

ISSUED: July 20, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

Justice Brent D. Benjamin, Disqualified