

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

DOUGLAS E. COX, Petitioner

July 17, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0151 (BOR Appeal No. 2044752)
(Claim No. 990064481)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ELK RUN COAL COMPANY, INC., Respondent

MEMORANDUM DECISION

Petitioner Douglas E. Cox, by Reginald Henry, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying the petitioner's request for a permanent total disability award. The West Virginia Office of Insurance Commissioner, by Jack Rife, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 22, 2010, in which the Board affirmed a June 29, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 27, 2007, decision to deny a permanent total disability award. 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 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.

In this case, Mr. Cox worked as an electrician and mine foreman for Elk Run Coal Company, Inc. He stopped working on August 14, 1997, due to back pain. Throughout his employment he suffered injuries to the cervical spine, right shoulder, and left middle toe. He also suffered from occupational hearing loss. Mr. Cox applied for a permanent total disability award on February 14,

2003. Based on the recommendation of the Permanent Total Disability Review Board, the claims administrator denied a permanent total disability award on December 27, 2007.

The Permanent Total Disability Review Board reviewed numerous evaluations in reaching the conclusion that although Mr. Cox met the statutory threshold for whole person impairment, he was able to return to substantial gainful activity. The Office of Judges found that Marj Weigel's functional capacity evaluation from October 20, 2009, was comparable to the Permanent Total Disability Review Board's findings, and noted there was no evaluation other than a records review that found Mr. Cox unable to engage in substantial gainful activity. Additionally, the Office of Judges noted that several evaluations found jobs available to Mr. Cox based on his experience.

In affirming the claims administrator's decision to deny a permanent total disability award, the Office of Judges concluded that Mr. Cox is able to engage in substantial gainful activity at a light to medium physical demand level. Mr. Cox disagrees and asserts that he is unable to engage in gainful activity and that the Social Security benefits decision was entitled to additional evidentiary weight.

In reaching the conclusion that Mr. Cox is not entitled to a permanent total disability award, the Office of Judges reviewed the Permanent Total Disability Review Board's final recommendations along with several more recent evaluations. The Office of Judges held that the Permanent Total Disability Review Board's findings are supported by a preponderance of the evidence. The Office of Judges also noted that the Social Security benefits decision listed Mr. Cox's severe impairments, the majority of which are not related to a compensable workers' compensation claim. Thus, the Office of Judges concluded that the preponderance of the evidence did not establish that Mr. Cox was entitled to a permanent total disability award. The Board of Review reached the same reasoned conclusion in its decision of December 22, 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 Board of Review Order is affirmed.

Affirmed.

ISSUED: July 17, 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