

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JOHN A. SEARS, Petitioner

vs.) No. 11-0189 (BOR Appeal No. 2044799)
(Claim No. 2001056488)

FILED

November 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

MEMORANDUM DECISION

Petitioner, John A. Sears, by John H. Shumate Jr., appeals the West Virginia Workers' Compensation Board of Review Order denying him a permanent total disability award. The West Virginia Office of Insurance Commissioner, by Mary Rich Maloy, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 20, 2011, in which the Board reversed a July 7, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's October 20, 2009, Order, which denied Mr. Sears 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.

Mr. Sears received several compensable injuries during the course of his employment as an electrician and coal miner and for which he received permanent partial disability awards. On March 13, 2008, Mr. Sears filed an application for permanent total disability benefits. Following review of his claim by the Permanent Total Disability Review Board, his claim was denied by the claims administrator. The Permanent Total Disability Review Board found that Mr. Sears does not suffer from a medical impairment of at least fifty percent on a whole body basis, and has therefore failed to meet the required level of whole body medical impairment for further consideration of an award for permanent total disability.

On July 7, 2010, the Office of Judges reversed the claims administrator's decision. The Office of Judges, relying on West Virginia Code § 23-4-6(n)(1), found that a claimant's percentages of permanent partial disability should be added, not combined and subject to the

Combined Values Chart found in the “Guides to the Evaluation of Permanent Impairment,” (4th ed. 1993) (“AMA *Guides*”), as published by the American Medical Association. West Virginia Code § 23-4-6(n)(1)(A) states that, to be eligible to apply for a permanent total disability award, a claimant “[m]ust have been awarded the sum of fifty percent in prior permanent partial disability awards[.]” Finding this to be the case, the Office of Judges reversed the claims administrator and referred the matter to the Permanent Total Disability Review Board for further consideration of Mr. Sears’s application for permanent total disability benefits.

On appeal, the Board of Review reversed the Office of Judges, however. The Board of Review noted that the issue is not whether Mr. Sears met the first threshold set forth in West Virginia Code § 23-4-6(n)(1)(A), but whether Mr. Sears met the second threshold contained within that statute. It is undisputed that Mr. Sears has met the first threshold, which requires prior permanent partial disability awards totaling at least fifty percent. After meeting this initial threshold, however, “the claim will be reevaluated by the examining board or other reviewing body pursuant to the subdivision (i) of this section to determine if the claimant has suffered a whole body medical impairment of fifty percent or more[.]” W. Va. Code § 23-4-6(n)(1). It is this second threshold that Mr. Sears has failed to meet.

The Board of Review’s decision should be affirmed. Mr. Sears argues that his impairment ratings should not be combined. He claims that there is no statutory authority for combining impairment ratings. To the contrary, West Virginia Code § 23-4-6(n)(1) provides that, following application for a permanent partial disability award, a claim will be reevaluated “pursuant to subdivision (i) of this section[.]” West Virginia Code § 23-4-6(i), in turn, states that “[t]he workers’ compensation commission shall adopt standards for the evaluation of claimants and the determination of a claimant’s degree of whole body medical impairment.” Such standards have been adopted, and are found in West Virginia Code of State Rules § 85-20-65.

“[A]ll evaluations, examinations, reports, and opinions with regard to the degree of permanent whole body medical impairment which an injured worker has suffered shall be conducted and composed in accordance with the “Guides to the Evaluation of Permanent Impairment,” (4th ed. 1993), as published by the American Medical Association.” West Virginia Code of State Rules § 85-20-65.1. The AMA *Guides* specifically instruct that the Combined Values Chart be used in determining whole person impairment: “. . . each organ system impairment should be expressed as a whole-person impairment; then the whole-person impairments should be combined by means of the Combined Values Chart.” AMA *Guides*, p. 8. After impairments for two unrelated conditions have been determined, “[t]he whole-person estimates for the two separate conditions then would be combined into an overall impairment estimate using the Combined Values Chart.” *Id.* Accordingly, following meeting the initial threshold to be eligible to apply for a permanent total disability award, the Board of Review properly relied on the Permanent Total Disability Review Board’s finding that Mr. Sears failed to meet the second threshold for entitlement to a permanent total disability award. Mr. Sears’s impairment ratings were properly combined at this stage, and the Board of Review’s decision should be affirmed.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, nor is it clearly the result of erroneous

conclusions of law, nor is it so clearly wrong based upon the evidentiary record that when all inferences are resolved in favor of the board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. Therefore, the denial of a permanent total disability award is affirmed.

Affirmed.

ISSUED: November 16, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin, disqualified