

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

RUSH J. CARTER, Petitioner

August 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0239 (BOR Appeal No. 2044860)
(Claim No. 2001055946)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
NEW SOUTH RESOURCES COMPANY, Respondent

MEMORANDUM DECISION

Petitioner Rush J. Carter, by John Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Gary Mazecka, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 21, 2011, in which the Board affirmed a July 23, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 29, 2009, decision granting Mr. Carter a 5% permanent partial disability award for urological problems. 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. Carter was employed as a miner operator with New South Resources Company. On May 24, 2001, he injured his thoracic spine during a roof fall; Mr. Carter eventually received an 11% permanent partial disability award for the injuries to his thoracic spine. Shortly after the injury he developed multiple urological problems. He has undergone three independent medical evaluations to determine the amount of permanent impairment resulting from these urological problems. Dr. Carlson performed an independent medical evaluation on January 23, 2007, but did not write his

report until July 7, 2008. Dr. Carlson found that Mr. Carter suffers from urological problems as a result of two fractured vertebrae sustained during the May 24, 2001, accident. Dr. Carlson recommended a 10% permanent partial disability award for Mr. Carter's urological problems by utilizing the urology chapter of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1995). On February 24, 2009, Dr. Walker, an occupational medicine specialist, and Dr. Sharma, a urologist, jointly performed an independent medical evaluation. They recommended a 5% permanent partial disability award for Mr. Carter's urological problems, and noted that because his urological problems stemmed from an injury to his thoracic spine his condition should have been rated using the nervous system chapter of the AMA *Guides* instead of the urology chapter used by Dr. Carlson. On April 16, 2010, Dr. Martin diagnosed Mr. Carter with a neurogenic bladder and agreed with Dr. Walker's and Dr. Sharma's recommendation of a 5% permanent partial disability award.

In its Order affirming the claims administrator's April 29, 2009, decision, the Office of Judges held that based on the preponderance of the evidence, Mr. Carter is entitled to a 5% permanent partial disability award for his urological problems caused by the thoracic spine injury. Mr. Carter disputes this finding and asserts, per the opinion of Dr. Carlson, that he is entitled to a 10% permanent partial disability award for his urological problems.

As noted by the Office of Judges, Dr. Carlson misapplied the AMA *Guides* by evaluating Mr. Carter's urological problems under the urology chapter, because Mr. Carter did not sustain a direct injury to any part of his urinary system. Rather, his symptoms are secondary to the thoracic spine injury. The Office of Judges found that Drs. Walker, Sharma, and Martin properly evaluated Mr. Carter's urological problems by utilizing the nervous system chapter to arrive at a recommendation of a 5% permanent partial disability award. The Board of Review reached the same reasoned conclusion in its decision of January 21, 2011.

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 decision of the Board of Review is affirmed.

Affirmed.

ISSUED: August 14, 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