

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

JOHNNY L. MAYNARD, Petitioner

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

vs.) No. 11-0255 (BOR Appeal No. 2044861)
(Claim No. 2001018505)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
HIGHLAND MINING COMPANY, Respondent

MEMORANDUM DECISION

Petitioner Johnny L. Maynard, by John Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Highland Mining Company, by Paul Pinson, 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 28, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 24, 2009, decision granting Mr. Maynard an additional 4% permanent partial 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. Maynard was employed as a heavy equipment operator with Highland Mining Company. On September 29, 2000, he sustained neck and back injuries while operating an end loader, and on March 21, 2001, he underwent a C5-C6 spinal fusion to treat the injuries he sustained in the September 29, 2000, accident. Following the spinal fusion, Mr. Maynard was granted a 25% permanent partial disability award. Subsequently, Mr. Maynard underwent three independent medical evaluations to determine whether he is entitled to an additional permanent partial disability

award in conjunction with the September 29, 2000, injury. On March 3, 2009, Dr. Grady found that Mr. Maynard sustained a 29% whole person impairment as a result of the September 29, 2000, injury. On August 27, 2009, Dr. Poletajev found that Mr. Maynard sustained a 37% whole person impairment as a result of the compensable injury. On January 27, 2010, Dr. Bachwitt found that Mr. Maynard has been fully compensated for the injuries he sustained on September 29, 2000, by the prior 25% permanent partial disability award.

In its Order affirming the March 24, 2009, claims administrator's decision, the Office of Judges held that the preponderance of the evidence indicates that Mr. Maynard is entitled to an additional 4% permanent partial disability award, for a total permanent partial disability award of 29% for the injuries he sustained on September 29, 2000. Mr. Maynard disputes this finding and asserts, per the opinion of Dr. Poletajev, that he is entitled to an additional 8% permanent partial disability award, for a total permanent partial disability award of 37% stemming from the September 29, 2000, injuries.

Specifically, the Office of Judges found that Dr. Poletajev's credibility is diminished given that he was the only medical examiner to find evidence of neurological deficits, radiculopathy in the lower spine, and forearm and calf atrophy. The Office of Judges noted that neither Dr. Grady nor Dr. Bachwitt substantiated these findings despite the fact that Dr. Grady examined Mr. Maynard before Dr. Poletajev and Dr. Bachwitt examined him afterwards. The Board of Review reached the same reasoned conclusions 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:

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

DISSENTING:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin disqualified