

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 2, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DAVID D. FARLEY, Petitioner

**vs.) No. 11-0309 (BOR Appeal No. 2044807)
(Claim No. 2000035385)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
HOBET MINING, INC., Respondent**

MEMORANDUM DECISION

Petitioner David D. Farley, 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 24, 2011, in which the Board affirmed a June 23, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 6, 2008, decision denying Mr. Farley's request to reopen the claim for further consideration of 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. Farley was most recently employed as a mine clerk with Hobet Mining, Inc. Mr. Farley filed an application for permanent total disability benefits on June 17, 2003, and was determined to have met the statutory threshold required for consideration of a permanent total disability award. Therefore, the issue on appeal is whether Mr. Farley is capable of engaging in substantial gainful employment. On May 5, 2005, Mr. Lilly conducted a functional capacity evaluation and stated that the test was invalid because Mr. Farley gave an unreliable effort, and that as a result he was unable to accurately determine the physical demand level at which Mr.

Farley can work. On June 23, 2005, Mr. Hileman reviewed Mr. Farley's medical records in order to give a permanent total disability rehabilitation recommendation. He concluded that Mr. Farley could potentially perform at the sedentary to light physical demand level. He found that Mr. Farley is not interested in participating in vocational rehabilitation. On September 17, 2008, the Permanent Total Disability Review Board stated in its final recommendation that Mr. Farley is capable of engaging in gainful employment at the sedentary to light physical demand level, and therefore denied his application for permanent total disability benefits. On October 31, 2009, Ms. Weigal performed a functional capacity evaluation and found that Mr. Farley is capable of working at the light physical demand level. She noted that Mr. Farley performed submaximally or inconsistently and put forth a self-limited effort. On December 17, 2009, Mr. Price completed a vocational rehabilitation report and found that Mr. Farley is not permanently and totally disabled and can work full-time at the light physical demand level. He noted that Mr. Farley is not motivated to return to the workforce.

In its Order affirming the claims administrator's October 6, 2008, decision, the Office of Judges held that the record as a whole does not demonstrate that Mr. Farley is entitled to a permanent total disability award. Mr. Farley disputes this finding and asserts that the evidence of record demonstrates that he is permanently and totally disabled.

Pursuant to West Virginia Code § 23-4-6(n)(2) (2005), in order to receive a permanent total disability award, a claimant must be unable to engage in substantial gainful employment. Additionally, West Virginia Code § 23-4-9(a) (2005) provides: "The Legislature further finds that it is the shared responsibility of the employer, the employee, the physician and the commission to cooperate in the development of a rehabilitation process designed to promote reemployment for the injured employee."

The Office of Judges found that Mr. Farley is obligated to cooperate with the vocational rehabilitation process, including all vocational rehabilitation assessments. The Office of Judges found that based upon the record, it appears that Mr. Farley failed to cooperate during his vocational rehabilitation evaluations and functional capacity evaluations to a degree sufficient to determine the amount of his overall disability. The Office of Judges further found that although Mr. Farley does have some legitimate physical and psychiatric impairment related to numerous compensable injuries, there is no vocational evidence of record demonstrating that Mr. Farley meets the criteria for a permanent total disability award under West Virginia Code § 23-4-6(n)(2). The Board of Review reached the same reasoned conclusion in its decision of January 24, 2011. We agree with the reasoning and conclusions of the Board of Review.

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: October 2, 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