

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

November 19, 2012

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

WILBERT LEE ADDAIR, Petitioner

vs.) No. 11-0466 (BOR Appeal No. 2044997)
(Claim No. 2002040049)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
VIRGINIA CREWS COAL CO., Respondent**

MEMORANDUM DECISION

Petitioner Wilbert Lee Addair, by John C. Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. West Virginia Office of the Insurance Commissioner, in its capacity as administrator of The Old Fund, by Jon H. Snyder, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 24, 2011, in which the Board affirmed an August 18, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of permanent total disability benefits. 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. Addair worked for 22 years as a coal miner for Virginia Crews Coal Co., where he received a series of compensable injuries. Mr. Addair was granted permanent partial disability of 20% impairment for occupational pneumoconiosis, 5% for hearing loss, and 7% for lumbar spine. In May of 2003, claimant applied for permanent total disability benefits, based on these impairments. A series of Orders in 2004 and 2005 resulted in the Office of Judges finding that

the 2003 amendments to the Worker's Compensation Code were not to be applied to claimant because his petition was prior to July 1, 2003, the date when the changes took effect.

In December of 2008, the claims administrator denied claimant's petition for permanent total disability benefits based on the worker's compensation statutory framework before the 2003 amendments took effect. The claims administrator stated that claimant failed to meet his burden of proof that he was incapable of performing gainful employment as a result of his compensable injuries. The claims administrator found that his orthopedic and vocational rehabilitation evidence supported finding that he may be employable, and may benefit from training and education to enhance employability.

The Office of Judges affirmed the claims administrator, specifically addressing the Social Security disability finding. It found that, had the Social Security disability been substantially similar to claimant's compensable injuries, it should have been afforded great deference to show entitlement to permanent total disability, as described in *Lambert v. Workers Comp. Div.*, 211 W. Va. 436, 566 S.E.2d 573 (2002):

The fact that a workers' compensation claimant has been awarded social security disability benefits is persuasive evidence that the claimant is permanently and totally disabled for workers' compensation purposes, and where social security disability is founded on work-related medical conditions that are substantially similar to those being asserted in connection with a workers' compensation claim for permanent total disability, the social security disability award should be given considerable weight.

Syllabus Point 4, *Id.*¹ The claimant, however, was awarded his Social Security disability award due to non-occupationally related depression. The Office of Judges stated that the record showed that only 2% of Mr. Addair's occupationally-related impairment was due to his psychiatric condition, and that, as the claims administrator articulated, there is no persuasive evidence of record to indicate claimant has been rendered permanently and totally disabled from returning to work or precluded from participating in vocational rehabilitation. The Board of Review reached the same reasoned conclusions in its February 24, 2011, Order.

¹ The Office of Judges mistakenly cited to Syllabus Point 3.

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: November 19, 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