

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 13, 2012

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

JIMMY C. CASTLE, Petitioner

vs.) No. 10-0488 (BOR Appeal No. 2045151)
(Claim No. 2007216746)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
EASTERN ASSOCIATED COAL CORPORATION,
LLC, Respondent**

MEMORANDUM DECISION

Petitioner Jimmy C. Castle, by John Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Eastern Associated Coal Corporation, by Robert Busse¹, 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 October 5, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's September 18, 2008, decision granting Mr. Castle a 3% permanent partial disability award for injuries to his lumbar spine. 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. Castle was employed with Eastern Associated Coal Company as an underground coal miner. On January 18, 2007, he fell out of a man trip and injured his back. On August 12, 2008, the claims administrator held the claim compensable for displacement of thoracic intervertebral

¹ On April 18, 2012, Mr. Busse withdrew from the representation of Eastern Associated Coal Corporation. Eastern Associated Coal Corporation is now represented by Henry Bowen.

disc without myelopathy, displacement of lumbar intervertebral disc without myelopathy, and lumbar sprain. On August 20, 2008, Dr. Bachwitt performed an independent medical evaluation and found that Mr. Castle suffers from a 5% permanent impairment of his lumbar spine, and attributed 2% of this impairment to preexisting degenerative changes. On August 11, 2009, Dr. Guberman performed an independent medical evaluation and recommended an 8% permanent partial disability award for the lumbar spine and a 7% permanent partial disability award for injuries to Mr. Castle's thoracic spine, for a total permanent partial disability award of 14%. Dr. Mir performed an independent medical evaluation on January 18, 2010, and found that Mr. Castle suffers from an 8% permanent impairment of his lumbar spine, and attributed 3% of this to degenerative changes. Dr. Mir found no impairment for the thoracic spine. On March 30, 2010, Dr. Mukkamala performed an independent medical evaluation and recommended an 8% permanent partial disability award for Mr. Castle's lumbar spine injury. Dr. Mukkamala disagreed with Dr. Guberman's recommendation of a 7% permanent partial disability award for the thoracic spine and stated that Mr. Castle reported no symptoms in relation to his thoracic spine.

In its Order reversing the September 18, 2008, claims administrator's decision, the Office of Judges held that the preponderance of the evidence shows that Mr. Castle suffered an 8% lumbar spine impairment and no thoracic spine impairment as a result of the January 18, 2007, injury. Mr. Castle disputes this finding and asserts that he is entitled to a permanent partial disability award for the thoracic spine, per the opinion of Dr. Guberman.

The Office of Judges found that Dr. Bachwitt's report was not persuasive because he failed to evaluate Mr. Castle's thoracic spine even though it was added as a compensable body part. The Office of Judges found Dr. Mir's and Dr. Mukkamala's recommendations of a 0% permanent partial disability award for the thoracic spine to be persuasive. Further, the Office of Judges found that Dr. Guberman's 7% thoracic spine impairment recommendation was not persuasive. The Office of Judges noted that the record does not indicate that Mr. Castle experiences any thoracic symptoms related to the January 18, 2007, injury, and found that there has not been a persuasive showing that he sustained any permanent thoracic spine impairment as a result of the compensable injuries. The Office of Judges noted that only Dr. Guberman found any ratable thoracic spine impairment. The Board of Review reached the same reasoned conclusions in its decision of February 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: December 13, 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