

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 13, 2012

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

KENNETH L. ROBERTS, Petitioner

vs.) No. 11-0492 (BOR Appeal No. 2044955)
(Claim No. 2005007517)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
TOPPINGS AND SONS, LLC, Respondent**

MEMORANDUM DECISION

Petitioner Kenneth L. Roberts, by Wendle Cook, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Mary Rich Maloy, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 18, 2011, in which the Board affirmed an August 3, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 19, 2009, decision granting Mr. Roberts a 3% permanent partial disability award based on the opinion of Dr. Padmanaban. 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. Roberts was injured on July 14, 2004, when he slipped and twisted his left knee. He suffered a previous left knee injury in the course of his employment on August 25, 1997, for which he received a 4% permanent partial disability award. Mr. Roberts has undergone four independent medical evaluations to determine the amount of permanent impairment resulting from the July 14, 2004, injury. On May 10, 2007, Dr. Loimil examined Mr. Roberts and found that he was fully compensated by the prior 4% permanent partial disability award. Dr. Guberman examined Mr. Roberts on June 10, 2008, and recommended an additional 12% permanent partial

disability award based on severe range of motion abnormalities. On May 26, 2009, Dr. Padmanaban found that Mr. Roberts's current symptoms are caused by arthritis present in both knees, but recommended a 3% permanent partial disability award for quadriceps muscle wasting. On March 30, 2010, Dr. Landis found that the overall amount of permanent impairment was essentially impossible to state, but felt that most of the impairment preexisted the 2004 injury.

In its decision affirming the March 19, 2009, claims administrator's decision, the Office of Judges held that all of Mr. Roberts's range of motion impairment is due to preexisting degenerative arthritis, but that he is entitled to a 3% permanent partial disability award for quadriceps muscle wasting. Mr. Roberts disputes this finding and asserts, per the opinion of Dr. Guberman, that he is entitled to an additional 12% permanent partial disability award for his left knee injury.

In its Order, the Office of Judges found that because of the extensive preexisting arthritis, range of motion is an inaccurate measure of the amount of Mr. Roberts's whole person impairment attributable to the compensable injury. The Office of Judges further found that after reviewing the evidence of record, the arthritic changes cannot be fully attributed to either work-related injury, and noted that this observation is supported by Mr. Roberts's development of significant degenerative changes in his uninjured right knee. The Office of Judges then found that because a portion of Mr. Roberts's impairment is attributable to degenerative changes, Dr. Guberman's report cannot be considered a credible basis for determining impairment caused by the 2004 injury. Finally, the Office of Judges found that it cannot be said that Mr. Roberts did not suffer some degree of muscle wasting as a result of the 2004 injury. The Board of Review reached the same reasoned conclusions in its decision of February 18, 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:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum