

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 24, 2012

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

HENRY W. ASTON, Petitioner

**vs.) No. 11-0513 (BOR Appeal No. 2044695)
(Claim No. 2007212997)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
CONSOLIDATION COAL COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner, Henry W. Aston, by M. Jane Glauser, his attorney appeals the Board of Review order granting a 5% permanent partial disability award. Consolidation Coal Company by Edward M. George, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated January 11, 2011, in which the Board affirmed an August 26, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's award of 0% permanent partial disability for Mr. Aston's left knee injury. 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, response, 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.

The Board of Review held Mr. Aston has reached maximum medical improvement for the left knee injury and affirmed the 0% permanent partial disability award. Mr. Aston asserts the treatment records from Dr. W. D. Grubbs establish additional diagnostic testing, MRI, referral to an orthopedic surgeon, and IME are necessary. Additionally, Mr. Aston asserts Dr. Joseph E. Grady II discussed a prior MRI which indicated "intrasubstance increased signal within the medial meniscus suggestive of an intrasubstance tear and some prepatellar subcutaneous edema." Mr. Aston argues that taken together this evidence is sufficient for a finding that Mr. Aston's left knee injury is not at maximum medical improvement and the 0% permanent partial disability award was granted in error.

However, Dr. Mutschler noted Mr. Aston's continued knee issues result from osteoarthritis of the knees, which is not a compensable component of the claim.

The Office of Judges considered the relevant medical evidence related to Mr. Aston's left knee injury. It held the accepted diagnoses under the claim include 844.9-sprain of unspecified site of the knee and leg, and 924.11-sprain of knee. The Office of Judges further noted Dr. Mutschler's notes on the June 17, 2008, report indicate that the majority of Mr. Aston's knee problems were due to bilateral osteoarthritis of the knees, which is not a compensable component of the claim. Mr. Aston also previously requested an additional MRI and referral to Dr. Mutschler and the Office of Judges found maximum medical improvement in that Order. Based upon this evidence, the Office of Judges held the preponderance of the evidence established Mr. Aston is at maximum medical improvement and no permanent impairment resulted from the compensable injuries. The Office of Judges, too, found no basis for Mr. Aston's assertion that he is not at maximum medical improvement, or for disputing the claims administrator's findings. The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of January 11, 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 Court affirms the Board of Review's denial of Mr. Aston's request for reversal and remand of this claim for further diagnostic testing, referral to Dr. Mutschler, and independent medical evaluation.

Affirmed.

ISSUED: April 24, 2012

CONCURRED IN BY:

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

DISSENTED IN BY:

Chief Justice Menis E. Ketchum