

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 5, 2012

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

ROGER T. THOBURN, Petitioner

vs.) No. 11-0668 (BOR Appeal No. 2045231)
(Claim No. 2009093393)

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

MEMORANDUM DECISION

Petitioner Roger T. Thoburn, by M. Jane Glauser, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Consolidation Coal Company, by Edward M. George III, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 31, 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 affirmed the claims administrator's April 5, 2009, decision denying the addition of low back pain and degenerative lumbar disc disease L4-L5, L4-S1 as compensable components in the claim. 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. Thoburn was working for Consolidation Coal Company as a coal miner on March 6, 2009, when he injured his lower back. The claim was held compensable for a lumbar sprain. On April 5, 2009, the claims administrator denied a request to add low back pain and degenerative lumbar disc disease at L4-L5, L4-S1 as compensable components in the claim.

The Office of Judges affirmed the claims administrator's Order and found that the preponderance of the evidence did not support a finding that low back pain and degenerative lumbar disc disease were compensable components in this claim. On appeal, Mr. Thoburn argues that the work-related injury aggravated an otherwise asymptomatic preexisting condition, and the claim should be held compensable for low back pain and degenerative lumbar disc disease. Consolidation Coal Company asserts that the evidence does not establish that low back pain and degenerative lumbar disc disease are compensable.

In affirming the claims administrator, the Office of Judges noted that the treating physician did not definitively find that degenerative disc condition was causally related to the injury. The Office of Judges concluded that the preponderance of the evidence established that the claimant had a preexisting condition, not related to the compensable injury. The Board of Review reached the same reasoned conclusions in its decision of March 31, 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 5, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum
Justice Margaret L. Workman