

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

March 27, 2013

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

LEE H. SYLVESTER,
Claimant Below, Petitioner

vs.) **No. 11-0927** (BOR Appeal No. 2045401)
(Claim No. 2008024974)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER**
Commissioner Below, Respondent

and

ALLEGHENY ENERGY SERVICE CORP.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Lee H. Sylvester, by George Zivkovich, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Allegheny Energy Service Corp., by Amy Andrews, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated June 8, 2011, in which the Board affirmed a December 6, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 17, 2009, decision granting Mr. Sylvester a 0% permanent partial disability award. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Sylvester worked as a maintenance mechanic for Allegheny Energy Service Corp. when he was injured. The claim was held compensable for a lumbar strain on December 28, 2007. Mr. Sylvester had also injured his back while at work in 2003, and received an 8% permanent partial disability award for that injury. On April 17, 2009, the claims administrator granted Mr. Sylvester a 0% permanent partial disability award.

The Office of Judges concluded that Mr. Sylvester had been fully compensated for his residual impairment by the prior 8% permanent partial disability award, and affirmed the claims administrator's Order. Mr. Sylvester disagrees and asserts that because he suffers from radiculopathy and atrophy, he is entitled to an additional 3% permanent partial disability award as evidenced by Dr. Dauphin's findings. Allegheny Energy Service maintains that the evidence establishes that Mr. Sylvester is not entitled to an additional permanent partial disability award. Drs. Bachwitt and Grady each found that Mr. Sylvester was fully compensated by the prior 8% award. Dr. Grady's report noted that Mr. Sylvester denied radiculopathy. Dr. Dauphin found that Mr. Sylvester was entitled to an 11% permanent partial disability award due to atrophy of the calf.

In affirming the claims administrator's Order, the Office of Judges concluded that the opinions of Drs. Bachwitt and Grady were most persuasive. It noted that an EMG and nerve conduction study were negative for radiculopathy. The Office of Judges also noted that there was evidence of a disc herniation that had not been held compensable, which could result in atrophy. The Office of Judges found that the preponderance of the evidence supported only the 8% permanent partial disability award Mr. Sylvester had previously received. The Board of Review reached the same reasoned conclusions in its decision of June 8, 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: March 27, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II