

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 24, 2013

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

**JAMES D. WHITE,
Claimant Below, Petitioner**

vs.) No. 11-1147 (BOR Appeal No. 2045246 & 2045314)
(Claim No. 820016325)

**CONSOLIDATION COAL COMPANY,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner James D. White, by William Talty, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Consolidation Coal Company, by Timothy Huffman, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated June 9, 2011, in which the Board affirmed the October 26, 2010, and November 17, 2010, Orders of the Workers' Compensation Office of Judges. In its Orders, the Office of Judges affirmed the claims administrator's June 17, 2009, decision granting Mr. White a 0% permanent partial disability award for the right elbow injury, and also affirmed the claims administrator's April 17, 2009, and December 15, 2009, decisions denying Mr. White's requests for a right elbow arthroscopy. 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. White was employed as an underground coal miner with Consolidation Coal Company. On July 6, 1981, he was injured when his right elbow was struck by a bar, and the claim was held compensable. Mr. White's current treating physician, Dr. Chand, has requested authorization for an arthroscopy of the right elbow to remove loose bodies that he asserts resulted from the July 6, 1981, injury. Additionally, Dr. Chand has recommended an 11%

permanent partial disability award for the compensable right elbow injury. On April 16, 2009, Dr. Smith performed a records review and found that because Mr. White is at maximum medical improvement, has been granted a 0% permanent partial disability award for the twenty-eight year old compensable injury, and because the accepted diagnoses consist of contusions and superficial injuries, the requested arthroscopy cannot logically be connected to the compensable injury. Dr. Mukkamala performed independent medical evaluations on June 8, 2009, and June 3, 2010, and recommended a 0% permanent partial disability award for the July 6, 1981, injury. He further found that any loose bodies in the right elbow are not a result of the July 6, 1981, injury and that no surgery is needed on the right elbow as a result of the July 6, 1981, injury.

In its Orders, the Office of Judges held that Mr. Smith is entitled to a 0% permanent partial disability award for the July 6, 1981, injury, and in affirming the denial of Mr. White's request for a right elbow arthroscopy, held that the evidence of record fails to establish a causal connection between his present medical condition and the July 6, 1981, injury. Mr. White disputes these findings and asserts, per the opinion of Dr. Chand, that he is entitled to an 11% permanent partial disability award and a right elbow arthroscopy as a result of the July 6, 1981, injury.

The Office of Judges found that at the time of the compensable injury, Mr. White's treating physician did not suggest that he sustained more than an elbow contusion, and that he missed no work as a result of the injury. The Office of Judges further found that Mr. White's own actions do not indicate that he sustained a serious injury, in that he did not take advantage of an opportunity in 1985 to proceed with surgical intervention, if he desired, and instead continued to work, apparently without incident, for approximately twenty years. The Office of Judges noted that while Dr. Mukkamala and Dr. Smith found no relationship between the July 6, 1981, injury and Mr. White's current right elbow condition, Dr. Chand, who first examined Mr. White twenty years after the compensable injury, related his current condition to the July 6, 1981, injury. Further, the Office of Judges found that even if Dr. Chand's opinion is afforded greater credibility as the treating physician, the preponderance of the evidence still does not establish that Mr. White sustained a serious injury on July 6, 1981. Finally, the Office of Judges adopted the conclusions expressed in Dr. Mukkamala's report. The Board of Review reached the same reasoned conclusions in its decision of June 9, 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: May 24, 2013

CONCURRED IN BY:

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

DISSENTING:

Justice Menis E. Ketchum