

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

June 12, 2013

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

CHARLES W. SMITH,
Claimant Below, Petitioner

vs.) No. 11-1167 (BOR Appeal No. 2045438 and 2045787)
(Claim No. 880032262)

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

and

FLEX-O-LITE, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Charles W. Smith, by Harley O. Staggers, Jr., his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by David L. Stuart, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated July 19, 2011, in which the Board affirmed the March 16, 2011, and December 10, 2010, Orders of the Workers' Compensation Office of Judges. In its March 16, 2011, Order, the Office of Judges affirmed the claims administrator's March 15, 2010, closure of Mr. Smith's claim for temporary total disability benefits based on a lack of evidence. In its December 10, 2010, Order, the Office of Judges affirmed the claims administrator's February 1, 2010, denial of Mr. Smith's application to reopen his claim for permanent partial disability benefits based on the fact that his application was time barred. 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. Smith injured his left knee on December 11, 1987, during the course of his employment with Flex-o-Lite when he tripped and struck his knee on a pipe. The injury was held compensable. Mr. Smith was given a 5% permanent partial disability award on July 3, 1989. This award was increased to 24% by an Order of the Office of Judges on July 9, 1996. Mr. Smith also received temporary total disability benefits periodically from October 16, 1992, to November 4, 1993. From that point, Mr. Smith was employed, either full or part time, until the end of 2004. On January 25, 2004, Mr. Smith was employed as a certified nursing assistant at the Joseph D. Brandenburg Center when he injured his back while lifting a patient out of a wheelchair. Mr. Smith has not returned to work since this injury. He was terminated on December 20, 2004, and received benefits under the State of Maryland's workers' compensation system.

Following his termination at Joseph D. Brandenburg Center, Mr. Smith filed an application to reopen his claim on a permanent partial disability basis and a temporary total disability basis. The claims administrator denied Mr. Smith's application but the Office of Judges reversed the decision on October 18, 2004, granting Mr. Smith temporary total disability benefits from March 30, 2004, through April 13, 2004, and thereafter as substantiated by proper medical evidence. The Office of Judges' October 18, 2004, Order was reversed by the Board of Review on March 9, 2006. But this Court reversed the Board of Review's Order on June 9, 2008, and reinstated the Office of Judges' October 18, 2004, Order.

On January 8, 2010, Mr. Smith submitted a written request to the claims administrator for reopening of his claim on a permanent partial disability basis and for payment of temporary total disability benefits based on the Office of Judges' October 18, 2004, Order. On February 1, 2010, the claims administrator denied Mr. Smith's request to reopen his claim on a permanent partial disability basis because the request was time-barred. In a separate decision, on March 15, 2010, the claims administrator closed Mr. Smith's claim for temporary total disability benefits because Mr. Smith did not submit medical evidence showing that he continued to be totally disabled past April 13, 2004. The Office of Judges affirmed both claims administrator decisions in separate opinions on December 10, 2010, and March 16, 2011. Both Orders of the Office of Judges were then affirmed, in a joint Order, by the Board of Review on July 19, 2011, leading to this appeal.

In its December 10, 2010, Order, the Office of Judges determined that Mr. Smith's request to reopen his claim on a permanent partial disability basis was properly refused by the claims administrator because it was time-barred. The Office of Judges also determined that Mr. Smith failed to establish a prima facie cause for reopening because the evidence in his January 8, 2010, application did not indicate a progression or aggravation of his condition.

In its March 16, 2011, Order, the Office of Judges found that the preponderance of the evidence does not support granting Mr. Smith temporary total disability benefits. The Office of Judges determined that Mr. Smith's knee injury on December 11, 1987, was not the cause of his current unemployment. The Office of Judges determined that his back injury, while working under the Maryland workers' compensation system, was an independent intervening injury.

In its July 19, 2011, Order, the Board of Review affirmed the December 10, 2010, and March 16, 2011, Orders of the Office of Judges. The Board of Review found that Mr. Smith's application for reopening his claim on a permanent partial disability basis was time barred. It also found that Mr. Smith was not entitled to additional temporary total disability benefits beyond the period set out in the Office of Judges' October 18, 2004, Order because Mr. Smith did not present sufficient evidence to establish his claim. Although the report of Dr. Kazi established that Mr. Smith had not reached maximum medical improvement, the Board of Review determined that it did not demonstrate that Mr. Smith continued to be temporarily and totally disabled.

We agree with the conclusions of the Board of Review and its affirmation of both Orders of the Office of Judges. West Virginia Code § 23-4-16(a)(2) (2005) requires that an application for reopening of a claim on a permanent partial disability basis be made within five years of the date of the initial award. In this case, Mr. Smith's initial award for permanent partial disability was made on July 3, 1989. His request for reopening on January 8, 2010, falls well outside the five year statutory time limit and is time-barred. Finally, Mr. Smith has not presented medical evidence to show that he continues to be temporarily and totally disabled or to relate his current unemployment to his compensable injury.

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: June 12, 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