

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

June 12, 2013

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

ROGER D. DAMRON,
Claimant Below, Petitioner

vs.) No. 11-1304 (BOR Appeal No. 2045663)
(Claim No. 2004011478)

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

and

ROCKHOUSE CREEK DEVELOPMENT,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Roger D. Damron, by John C. Blair, 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 August 24, 2011, in which the Board affirmed a February 24, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's July 8, 2010, decision denying the claimant's application for permanent total disability benefits. 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.

On September 23, 2009, Mr. Damron submitted an application to reopen his claim for consideration of permanent total disability benefits. Mr. Damron has suffered a variety of compensable injuries for which he has received permanent partial disability awards. In his application, Mr. Damron listed eight separate injuries for which he had received a sum of 52% in permanent partial disability awards. The listed sum included an 8% permanent partial disability award for psychiatric impairment issued by the claims administrator on April 2, 2009, but which was still in litigation at the time of the application. On June 25, 2010, the Office of Judges reversed the April 2, 2009, decision of the claims administrator and reduced the claimant's psychiatric impairment award from an 8% to a 2% permanent partial disability award. Following this Order, on July 8, 2010, the claims administrator denied Mr. Damron's application for permanent total disability benefits because he had not met the threshold sum of at least 50% in permanent partial disability awards. The claims administrator's decision was affirmed by the Office of Judges on February 24, 2011, and by the Board of Review on August 24, 2011, leading to this appeal.

The Office of Judges determined that, although Mr. Damron listed compensable injuries for which he had received permanent partial disability awards in excess of 50% in his application for permanent total disability benefits, one of those permanent partial disability awards was in litigation at the time of his application and, therefore, was not final. The Office of Judges determined that the Order issued by the Office of Judges on June 25, 2011, and affirmed by the Board of Review on December 22, 2011, reduced Mr. Damron's final award based on psychiatric impairment to 2% and effectively dropped the sum of his prior permanent partial disability awards below the threshold established in West Virginia Code § 23-4-6(n)(1) (2005). The Office of Judges found that Mr. Damron did not have any currently pending claims for permanent partial disability and, therefore, determined that Mr. Damron did not qualify for further consideration of permanent total disability benefits. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusions of the Board of Review. The 8% permanent partial disability award for psychiatric impairment was not final at the time of Mr. Damron's September 23, 2009, application for reopening of his claim on a permanent total disability basis. By the time it became finalized, the award had been reduced to a 2% permanent partial disability award by the June 25, 2010, Order of the Office of Judges. This final determination reduced the sum of permanent partial disability awards received by Mr. Damron below the threshold 50% amount. Mr. Damron has not met the initial threshold sum of prior permanent partial disability awards established under West Virginia Code § 23-4-6(n)(1), and does not qualify for further consideration of permanent total disability benefits.

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 Menis E. Ketchum
Justice Allen H. Loughry II