

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

June 6, 2013

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

JOHNNY R. HAGER,
Claimant Below, Petitioner

vs.) **No. 11-1339** (BOR Appeal No. 2045679)
(Claim No. 2005002377)

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

and

PANTHER BRANCH COAL COMPANY,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Johnny R. Hager, by Wendle Cook, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by David 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 18, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 13, 2009, decision denying a reopening of the claim for consideration of an additional 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. Hager worked as a coal miner for Panther Branch Coal Company. On July 12, 2004, he injured his back, ribs, and legs while at work. On November 11, 2005, he received a 22% permanent partial disability award for his compensable injuries. On August 13, 2009, the claims administrator denied a request to reopen the claim for consideration of an additional permanent partial disability award.

The Office of Judges affirmed the claims administrator's decision, and held that the preponderance of the evidence did not establish that Mr. Hager has suffered an aggravation or progression of his compensable injury, or that there were facts that were previously unconsidered. Mr. Hager disagrees and asserts that treatment notes and his physician's opinion clearly demonstrate that he is suffering from worsened symptoms and is entitled to a reopening. The West Virginia Office of Insurance Commissioner maintains that Mr. Hager has not presented new facts giving rise to an aggravation or progression of his compensable conditions that would entitle him to greater benefits than already received, and that he has failed to present a prima facie cause to reopen.

Under West Virginia Code §§ 23-5-2 (2005) and 23-5-3 (2009), to reopen a claim a claimant must make an application in writing showing a progression or aggravation of the compensable condition or some other facts which were not previously considered which would entitle the claimant to greater benefits than he or she has already received. Further, in *Harper v. State Workmen's Compensation Commissioner*, 160 W.Va. 364, 234 S.E.2d 779 (1977), this Court has held that the claimant needs to show a prima facie cause for adjustment of an award, which is nothing more than evidence which would tend to justify, but not compel, the inference that there has been a progression or aggravation of the former injury. The Office of Judges held that Mr. Hager had not suffered an aggravation or progression of the permanent impairment he suffered in this claim, and that there are no facts previously unconsidered. It noted that the application requested an examination for permanent disability, but only indicated that Mr. Hager was complaining of worsening pain. Thus, the Office of Judges concluded that the denial of a reopening of the claim was correct. The Board of Review reached the same reasoned conclusions in its August 24, 2011, decision. 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: June 6, 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