

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

PERFORMANCE COAL COMPANY,
Employer Below, Petitioner

FILED
October 25, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-1348 (BOR Appeal No. 2045608)
(Claim No. 2002009570)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
Commissioner Below, Respondent

and

KERMIT R. MORRIS,
Claimant Below, Respondent

MEMORANDUM DECISION

Petitioner Performance Coal Company, by Sean Harter, its attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Kermit R. Morris, by Reginald Henry, his attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated August 30, 2011, in which the Board modified a February 15, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges modified the claims administrator's December 28, 2007, decision which awarded Mr. Morris permanent total disability benefits with the onset date of April 15, 2004. 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. Morris worked as a coal miner for many years, and as a result of his employment he incurred various injuries and diseases. He was injured in a rock-fall on August 9, 1999, and did

not return to work thereafter. He was diagnosed with bilateral carpal tunnel syndrome, and the claim was held compensable in 2001 for such. Mr. Morris filed for permanent total disability benefits on January 15, 2003. On December 28, 2007, the claims administrator granted Mr. Morris permanent total disability benefits with an onset date of April 15, 2004. The Office of Judges held that Mr. Morris is permanently and totally disabled, but modified the claims administrator's decision to reflect August 9, 1999, as the onset date for permanent total disability.

The Board of Review modified the Office of Judges' Order, and held that Mr. Morris is entitled to permanent total disability benefits with an onset date of November 30, 2001. Performance Coal Company disagrees and asserts that if Mr. Morris is entitled to permanent total disability benefits, the onset date should be the date of the functional capacity evaluation dated February 18, 2009. Mr. Morris maintains that the Board of Review's Order is correct.

Pursuant to *Lambert v. Workers' Compensation Division*, 211 W.Va. 436, 566 S.E.2d 573 (2002), the Board of Review held that based upon the reliable and credible evidence November 30, 2001, the date Mr. Morris was awarded Social Security benefits, was the onset of permanent total disability. We agree with the reasoning and conclusions of the Board of Review. The preponderance of the evidence establishes that Mr. Morris is permanently and totally disabled due to occupational injuries and diseases, and that the onset of permanent total disability should be established as November 30, 2001.

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: October 25, 2013

CONCURRED IN BY:

Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

DISQUALIFIED:

Chief Justice Brent D. Benjamin