

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
January 20, 2015
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LARRY DENNIS,
Claimant Below, Petitioner

vs.) No. 14-0038 (BOR Appeal No. 2048495)
(Claim No. 2007212843)

MCELROY COAL COMPANY,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Larry Dennis, by M. Jane Glauser, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. McElroy Coal Company, by Edward M. George III, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 23, 2013, in which the Board affirmed a May 29, 2013, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 3, 2010, decision denying Mr. Dennis'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.

Mr. Dennis worked as an underground miner for McElroy Coal Company. Mr. Dennis sustained several injuries throughout the course of his employment including a cervical spine injury and a right shoulder injury. The claims administrator granted Mr. Dennis an 8% permanent partial disability award for his cervical spine and an 11% award for his right shoulder based on an evaluation by James Wiley, M.D. On October 13, 2006, he injured his head, neck, upper back, and shoulder when a mining canopy fell on him in an underground mine. Following this injury, Joseph E. Grady II, M.D., evaluated Mr. Dennis and found that he had 25%

impairment for his cervical spine under the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) and Cervical Category IV of West Virginia Code of State Rules § 85-20-E (2006). He also determined that Mr. Dennis had 13% impairment for his left shoulder. The claims administrator granted Mr. Dennis a permanent partial disability award based on Dr. Grady's evaluation. Mr. Dennis filed an application for permanent total disability benefits based on his prior permanent partial disability awards. The claims administrator initially denied Mr. Dennis's application because he had not been granted a sum of 50% permanent partial disability in prior awards. This Court, however, eventually reversed the claims administrator's decision and remanded the claim for further consideration of Mr. Dennis's permanent total disability application. The claims administrator granted Mr. Dennis an additional 1% permanent partial disability award for his psychiatric condition. Sushil Sethi, M.D., then evaluated Mr. Dennis and found that he had 18% impairment for his cervical spine, and 3% impairment for his left shoulder. Dr. Grady then reevaluated Mr. Dennis and modified the impairment finding related to his left shoulder from 13% impairment to 11% impairment. Mr. Dennis was then evaluated by the Permanent Total Disability Reviewing Board, who found that he had 23% whole person impairment related to his compensable injury. The Board based this determination on the evaluation of Dr. Sethi, but it also added 3% impairment to Dr. Sethi's recommendation related to Mr. Dennis's right shoulder. On February 3, 2010, the claims administrator rejected Mr. Dennis's application for permanent total disability benefits based on the Board's recommendation. On May 29, 2013, the Office of Judges affirmed the claims administrator's decision. The Board of Review then affirmed the Order of the Office of Judges on December 23, 2013, leading Mr. Dennis to appeal.

The Office of Judges concluded that the evidence did not show that Mr. Dennis has suffered at least 50% whole person impairment as required for further consideration of his permanent total disability benefits under West Virginia Code § 23-4-6(n)(1) (2005). In reaching this determination, the Office of Judges found that the only evidence in the record which was relevant to the determination of Mr. Dennis's whole person impairment was the evaluations of Dr. Wiley, Dr. Grady, and Dr. Sethi. The Office of Judges found that even when it considered the evidence in a light most favorable to Mr. Dennis, these evaluations showed that Mr. Dennis had, at most, 25% impairment for his cervical spine, 11% impairment for his left shoulder, 11% impairment for his right shoulder, and 1% impairment for his psychiatric condition. The Office of Judges determined that these various impairments equaled 41% whole person impairment and was, therefore, short of the whole person impairment threshold. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

On appeal, Mr. Dennis argues that he is entitled to permanent total disability benefits because he has been granted a sum of at least 50% in prior permanent partial disability awards. Mr. Dennis argues that this alone is sufficient to entitle him to consideration of his permanent total disability benefits under West Virginia Code § 23-4-6(n)(2) (2005). Mr. Dennis argues that he should not have been reevaluated by the Permanent Total Disability Reviewing Board.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Mr. Dennis has not demonstrated that he has suffered at least 50% whole person impairment from his compensable injuries. The available evaluations show that Mr. Dennis

sustained injuries to his cervical spine, right shoulder, and left shoulder. The record further establishes that he developed psychiatric conditions related to his injuries. However, the evaluation of the Permanent Total Disability Reviewing Board confirms that Mr. Dennis has not suffered 50% impairment related to these conditions, and its recommendation was supported by the remainder of the evidence in the record. Mr. Dennis's argument on appeal is contrary to the plain language of West Virginia Code § 23-4-6(n)(1). Mr. Dennis is not entitled to permanent total disability benefits, and his application was properly denied.

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: January 20, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum