

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

September 13, 2019  
EDYTHE NASH GAISER, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**CHARLES G. DELBERT,**  
**Claimant Below, Petitioner**

**vs.) No. 18-0890** (BOR Appeal No. 2052831)  
(Claim No. 2017018492)

**MURRAY AMERICAN ENERGY, INC.,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Charles G. Delbert, by Counsel M. Jane Glauser, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Murray American Energy, Inc., by Counsel Denise D. Pentino and Aimee M. Stern, filed a timely response.

The issue on appeal is compensability. The claims administrator rejected the claim on February 13, 2017. The Office of Judges affirmed the decision in its March 29, 2018, Order. The Order was affirmed by the Board of Review on September 20, 2018.

The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration. 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. Delbert, an underground coal miner, alleges that he developed an occupational disease as a result of repeatedly striking his head in the mines. In an October 29, 2008, deposition for claim number 200156879, Mr. Delbert testified that he is tall and sometimes bumps his head in the coal mines. He alleged it causes pain in his mid-back from the downward pressure on his head. He testified in another deposition on February 25, 2013, for claim number 990051738, that he was bent over while shoveling coal, stood up, and hit his head on the five-foot-high roof. He stated that he was wearing a hardhat at the time but still had pain in his head and arms as a result. He also stated that he bumps his head a lot and gets a lot of headaches.

In a February 23, 2016, medical statement, Ryan Wakim, M.D., requested authorization for medication management with up to twelve appointments a year; neuropsychological testing for traumatic brain injury concerns; and the medication Wellbutrin to treat the diagnoses of thoracic sprain, displacement of thoracic intervertebral disc without myelopathy, depression, and chronic pain syndrome. The claims administrator denied neuropsychological testing in claim number 200156879.

In the August 19, 2016, Employees' and Physicians' Report of Injury for the claim at issue, Mr. Delbert alleged that he developed an occupational disease as a result of hitting his head and neck repeatedly in the mines. His last date of exposure was listed as May 20, 2009. He stated he hit his head very hard quite a few times, moderately hard many times, and less hard thousands of times. The physician's section was completed by Dr. Wakim and listed the diagnoses as major depressive disorder, unspecified mental disorders, and unspecified personality disorder. In an August 23, 2016, medical statement, Dr. Wakim requested authorization for neuropsychological testing for persistent memory complaints. It was noted that Mr. Delbert has a history of multiple head traumas and has one to two appointments a month for mental health.

The claims administrator rejected the claim on February 13, 2017, stating that the filing was for an occupational disease, which is inconsistent with the injury description of hitting his head. The claims administrator also found the filing was beyond the statute of limitations as Mr. Delbert had not worked since 2009, and the physician listed on the Employees' and Physicians' Report of Injury was not qualified to diagnose the condition listed.

Christi Cooper-Lehki, D.O., performed an independent medical evaluation on April 26, 2017, for claim number 2001056879 in which she found that Mr. Delbert had reached maximum medical improvement for his compensable diagnosis of depressive disorder. Dr. Cooper-Lehki assessed 4% impairment. She noted that Mr. Delbert told several people that he has chronic traumatic encephalopathy due to several head injuries he sustained in the mines. Dr. Cooper-Lehki found that Mr. Delbert had never undergone any brain imaging. Further, psychological testing performed on three separate occasions failed to suggest a brain injury, and she saw no need for further neuropsychological testing. Dr. Cooper-Lehki found no documentation supporting Mr. Delbert's assertion that he repeatedly hit his head in the mines.

Kirk Bryant, Ph.D., evaluated Mr. Delbert on April 28, 2017, per Dr. Cooper-Lehki's request. Dr. Bryant noted that Mr. Delbert reported hitting his head several times while working in the mines. After evaluation, he found that Mr. Delbert had a superior intellect with strength in working memory but weakness in processing speed, though he was still in the average range. He had somatic complaints and irritability, which Dr. Bryant attributed to depression. Dr. Bryant found that Mr. Delbert had executive functioning weakness in problem solving. He opined that it was possible the weakness interferes with his encoding of new information, leading to lapses in memory. Dr. Bryant concluded that pain, mood disturbance, and anxiety are the likely causes of his cognitive weaknesses.

In a July 19, 2017, record review, Brett Alldredge, D.O., noted that the first mention of a head injury in the record was in a 2005 independent medical evaluation when Mr. Delbert reported

that he bumped his head in February of 1999 and was dazed. In a 2004 evaluation by Dr. Bailes, there was no mention of brain injury. There was also no mention of a head injury in a 2007 evaluation, but two days later, Mr. Delbert reported to Dr. Wack that he hit his head several times while riding a train in the mines. In an April 2008 functional capacity evaluation, Mr. Delbert listed head and spine disorder on the medical history form but he was not evaluated for or diagnosed with a brain injury. Dr. Alldredge found that the August 2016 injury report indicates Mr. Delbert allegedly hit his head on objects several times while working in the mines. He also reported alleged head trauma to Dr. Wakim. Dr. Alldredge found that Mr. Delbert does not have a traumatic brain injury as a result of head trauma while working in the mines. He found no objective evidence of injury to the brain and no evidence showing concern for a brain injury. Though Mr. Delbert has some symptoms that can be associated with a brain injury, Dr. Alldredge concluded that those symptoms are present in other conditions and have been found to be the result of other conditions in this case. He noted that if Mr. Delbert did develop a traumatic brain injury at the time of the initial incident in 1999, the symptoms would have manifested at that time. Dr. Alldredge concluded that there were no objective symptoms to support a traumatic brain injury.

The Office of Judges affirmed the claims administrator's rejection of the claim in its March 29, 2018, Order. It found that Mr. Delbert has filed several claims for injuries sustained when he bumped his head in the mines. In the claim at issue, Mr. Delbert alleges that he developed an occupational disease as a result of multiple instances in which he hit his head in the mines. His date of injury or last exposure was listed as May 20, 2009. Dr. Wakim noted on the application for benefits that he first examined Mr. Delbert on June 17, 2015, and that he suffered from chronic pain. The Office of Judges found that Mr. Delbert has not had exposure for years and has filed prior injury claims for striking his head in the mines. He was evaluated by Dr. Cooper-Lehki for psychiatric impairment in claim number 2001056879 and she assessed 4% impairment. Dr. Alldredge performed a record review in which he opined that Mr. Delbert's records show no indication that he ever suffered a traumatic brain injury. Further, Dr. Alldredge opined that if he did have a traumatic brain injury, it would have manifested around the time the injury occurred. The Office of Judges therefore concluded that Mr. Delbert has not shown that he suffered an occupational disease as a result of hitting his head several times in the mines. Further, if his exposure stopped in 2009, the claim is untimely. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on September 20, 2018.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. A preponderance of the evidence of record fails to support Mr. Delbert's assertion that he developed an occupational disease as a result of repeated head trauma in the mines.

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: September 13, 2019**

**CONCURRED IN BY:**

Chief Justice Elizabeth D. Walker

Justice Margaret L. Workman

Justice Tim Armstead

Justice Evan H. Jenkins

Justice John A. Hutchison