

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 23, 2013

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

GREGORY A. KUPFNER SR,

vs.) No. 090542 (BOR Appeal No. 2041674)
(Claim No. 890020121)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER**

and

MURRAYS SHEET METAL COMPANY, INC.,

MEMORANDUM DECISION

Petitioner Gregory A. Kupfner Sr, by J. Robert Weaver, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The Insurance Commissioner as Administrator of the Old Fund, by S. L. Evans, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 9, 2009, in which the Board affirmed an August 11, 2008, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's decision to deny the claimant a permanent total disability award. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, the Court is of the opinion that this case is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In this case, the claims administrator denied Mr. Kupfner's request for a permanent total disability award on March 8, 2004. Mr. Kupfner protested and argued that he would never be able to return to his prior work as a sheet metal worker due to his multiple back injuries and his knee injury. He also testified that although he obtained a degree in elementary education, he would never be able to work as a school teacher because of his limitations due to his work related injuries.

The petitioner submitted an orthopedic evaluation from Dr. Joseph Fernandez, in which Dr. Fernandez opined that the claimant would not be able to return to work as a consequence of his multiple back surgeries and his extreme obesity. Mr. Kupfner reported that he had been awarded Social Security disability, but he failed to submit the entire report into the record. It is unknown whether the Social Security award was solely based upon Mr. Kupfner's compensable injuries or, instead, based upon his numerous non-compensable medical conditions.

The Office of Judges found that the only Functional Capacity Evaluation of record determined that Mr. Kupfner could work at the light physical demand level, which would encompass the duties of a teacher. During rehabilitation, the petitioner earned a degree in elementary education, and he maintains a teaching certificate. The Office of Judges noted that Vocational Consultant Tina Walsh found that Mr. Kupfner did not require any additional vocational training and was employable with his degree in elementary education. Accordingly, it was held that Mr. Kupfner is not permanently and totally disabled within the meaning of West Virginia Workers' Compensation law.

The Office of Judges affirmed the claims administrator's decision. The Board of Review reached the same conclusion. Based upon the evidence of record, we agree with the Board's decision because the evidence is insufficient to establish that the petitioner is permanently and totally disabled.

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: April 23, 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