

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

GERALD R. JENKINS, Petitioner

February 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 101383 (BOR Appeal No. 2044314)**
(Claim No. 2000059895)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
CONSOLIDATION COAL COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner Gerald R. Jenkins, by Robert Stultz, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying permanent total disability benefits. Consolidation Coal Company, by Edward George, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 5, 2010, in which the Board affirmed a March 23, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the Claims Administrator's March 23, 2009, Order which denied permanent total disability benefits. 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, this Court is of the opinion that this matter 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.

The Board of Review affirmed the holding that the preponderance of the evidence did not support an award of permanent total disability. Petitioner disagrees with this finding and

argues that it was incorrect for the Permanent Total Disability Review Board to use the Combined Values Chart under the American Medical Association's, *Guides to Evaluation of Permanent Impairment* (4th ed. 1993), because the impairment relates to different bodily functions. Further, petitioner contends that he suffers from more impairment than was found.

In its Order affirming the Claims Administrator's denial of permanent total disability benefits, the Office of Judges noted that even assuming the petitioner was entitled to the greater impairment, the 50% statutory threshold would still not be met. (March 23, 2010, Office of Judges Order, p. 9). It further noted the absence of any evidence demonstrating that the petitioner was suffering from a 50% whole body medical impairment. *Id.* The Office of Judges ultimately found the Permanent Total Disability Review Board was correct in their finding that the claimant was not entitled to permanent total disability benefits. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of October 5, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the Board of Review Order is affirmed.

Affirmed.

ISSUED: : February 22, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum